NO. 76630-9-I

(King County Superior Court No. 16-2-09719-7 SEA)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

FREEDOM FOUNDATION,
Appellant/Defendant,

v.

UNIVERSITY OF WASHINGTON,
Defendant,

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925,
Respondent/Plaintiff,

RESPONDENT SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925'S OPENING BRIEF

Counsel for Respondent SEIU 925

Kristen Kussmann, WSBA #30638
Jacob Metzger, WSBA #39211
Douglas Drachler McKee & Gilbrough
1904 Third Ave, Suite 1030
Seattle, WA 98101-1170
Phone: (206) 623-0900
Fax: (206) 623-1432
kkussmann@qwestoffice.net
jmetzger@qwestoffice.net

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I. INTRODUCTION

Appellant Freedom Foundation ("the Foundation") seeks, through a request under the Public Records Act ("PRA"), to obtain documents from Respondent University of Washington ("UW") that are not subject to disclosure under the PRA because they are not public records, as they are personal and private records that do not "relat[e] to the conduct of government or the performance of any governmental or proprietary function." RCW 42.56.010(3). Specifically, the Foundation's PRA request to UW resulted in the retrieval of documents of UW Professor Robert Wood, a member of Service Employees International Union Local 925 ("SEIU 925"), including documents about faculty union organizing where no union is currently certified or recognized by UW; the UW chapter of the American Association of University Professors ("AAUP"), a private organization; and other personal and private matters ("documents at issue"). The trial court reviewed extensive briefing from all parties – SEIU 925, the Foundation, and UW – and heard oral argument on three dates, properly granting a temporary restraining order ("TRO"), a preliminary injunction, and a permanent injunction, because none of the documents at issue are "public records" as defined by the PRA. The trial court also properly granted SEIU 925's Motion to Change Trial Date and for Stay of Proceedings and denied the Foundation's Motion to Strike and for

Sanctions, because one of the causes of action (and attendant, separate relief) in the case before the trial court was not addressed in the permanent injunction order. SEIU 925 therefore seeks an order affirming the trial court's decisions enjoining UW from releasing the documents at issue to the Foundation, and affirming the trial court's order staying the trial.[1]

II. ISSUES

1. Should the trial court's permanent injunction order be affirmed, because the documents at issue are not public records as they are not related to the conduct of government or the performance of a governmental or proprietary function?

2. Is the Foundation precluded from arguing that the trial court erred in granting a TRO and preliminary injunction and denying reconsideration of the preliminary injunction, because the Foundation did not timely file an appeal?

3. Should the trial court's preliminary injunction order be affirmed, because the documents at issue are not public records as they are not related to the conduct of government or the performance of a governmental or proprietary function?

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[1] The trial court did not reach SEIU 925's arguments that exemptions or prohibitions on disclosure should apply, nor are these addressed in the Foundation's Opening Brief. Thus, should this Court find any portion of the documents at issue to be public records, SEIU 925 respectfully requests that the case be remanded to the trial court for consideration of the exemptions and prohibitions. *See, e.g., Dragonslayer, Inc. v Washington Gambling Commission,* 139 Wn.App 433, 445-46, 161 P.3d 428 (2007).

4. Should the trial court's TRO be affirmed, where the purpose of a TRO is to preserve the status quo and the overwhelming majority of records enjoined by the TRO are not public records as they are not related to the conduct of government or the performance of a governmental or proprietary function?

5. Should the trial court's grant of SEIU 925's motion to stay proceedings and denial of the Foundation's motion to strike and for sanctions be affirmed, where the trial court's permanent injunction did not reach one cause of action (and relief) alleged in the Complaint?

III. STATEMENT OF THE CASE

On December 27, 2015 the Foundation requested from UW:

1. All documents, emails or other records created by, received by, or in the possession of University of Washington faculty/employees Amy Hagopian, Robert Wood, James, Liner, or Aaron Katz that contain any of the following terms:
   a. Freedom Foundation (aka., "FF," "EFF," and "The Foundation")
   b. Northwest Accountability Project
   c. Right-to-work (aka., "right to work," "RTW,", and "R2W")
   d. Friedrichs v. California Teachers Association (aka., "Friedrichs v. CTA" and "Friedrichs")
   e. SEIU
   f. Union
2. All emails sent by University of Washington faculty/employees Amy Hagopian, Robert Wood, James Liner, or Aaron Katz to any email address ending in "@seiu925.org" or "@uwfacultyforward.org"

3. All emails received by University of Washington faculty/employees Amy Hagopian, Robert Wood, James Liner, or Aaron Katz from any email address ending in "@seiu925.org" or "@uwfacultyforward.org"
4. All emails sent from and received by the following email address: aaup@u.washington.edu

CP 36. On its face, the request does not seek information regarding the conduct of government and is likely to yield documents unrelated to the conduct of government, as it requests emails to and from private accounts (@seiu925.org and @uwfacultyforward.org), information about union issues (including "right to work," "SEIU," and "Union"), and emails on the listserver of a private organization, the UW chapter of the AAUP.

SEIU 925 is a labor union representing public and private sector workers in Washington State. CP 34. SEIU 925 is working with faculty at UW interested in organizing a union under RCW 41.76 et seq. *Id.*

The UW chapter of the AAUP, which has existed since 1918, is a private non-profit organized under Section 501(c)(6) of the Internal Revenue Code. CP 100. The national AAUP is also a non-profit organized under Section 501(c)(6). *Id.* The UW AAUP chapter's listserver (aaup@u.washington.edu) is open, through approval, to individuals other than AAUP UW chapter members and UW employees and students. *Id.*

Professor Wood is a tenured Professor in the Department of Atmospheric Sciences at UW, and has held various professor titles in that

Department since 2004. CP 99-100. He is a member of SEIU 925, and has served as chapter President of the UW chapter of the AAUP. CP 100. Professor Wood's union and AAUP activities are not within the scope of his job duties and responsibilities at UW. CP 101, 107-14.

The Foundation has openly proclaimed its hostility toward public sector unions. CP 96. As some examples, the Foundation's website declares that it is "working to reverse the stranglehold public sector unions have on our government." *Id.* Another Foundation website post brags that it "devotes nearly every hour of every work day to exposing the abuses of public-employee unions in general and SEIU in particular." *Id.* Its website contains a blog with regular posts attacking public sector unions. *Id.* [2]

The UW Office of Public Records asked Professor Wood to search for records responsive to the Foundation request. CP 101-02. Professor Wood provided to that office emails resulting from an electronic search using the terms and email domains identified in the Foundation request, including emails sent from his UW email and his personal, non-UW email address. CP 102. Before providing the documents to UW, Professor Wood did not further screen or review the emails to determine which were not

[2] The Foundation's purported purpose of this request is to promote accountability and transparency among government employees. Foundation Opening Brief, 4. However, except with respect to the commercial purposes prohibition, the PRA prohibits an inquiry into the purpose of a PRA request. *SEIU Healthcare 775 v. Dept. of Social and Health Services,* 193 Wn.App. 377, 405, 377 P.3d 214 (2016), *rev. denied,* 186 Wn.2d 1016, 380 P.3d 502 (2016).

public records or were otherwise exempt or prohibited from disclosure, because of the volume of documents. *Id.* He sends and receives personal and private emails from all of his email accounts. CP 101.

On April 12, 2016, Perry Tapper, Compliance Officer, UW Office of Public Records, emailed Professor Wood to inform him that "those emails you provided from your email account" would be provided to the Foundation on April 27 absent a court order by April 26 enjoining UW from releasing them. CP 102, 120-21.

On April 18, 2016, Professor Wood picked up a CD containing the records Tapper stated UW intended to release to the Foundation. CP 102. The CD contains 3,913 pages of documents labeled "PR-2015-00810 Stage 1 Release_paginated.pdf." *Id.* Some of the documents relate to union organizing at UW. CP 103, 104. Some are postings on the AAUP UW chapter listserver. *Id.* Some are emails received by Professor Wood in his capacity as President of the AAUP UW chapter. Appendix D (Metzger, Dale, Layton, and Lather Decs.). The emails name and/or pertain to both SEIU 925 and/or Professor Wood. CP 35, 97, 104. Some emails were sent from or received at Professor Wood's private, non-UW email address. CP 104. Many emails are duplicates. Appendix D (Metzger, Dale, Layton, and Lather Decs.). Some were merely received by Professor Wood. CP 102.

Tapper, who reviewed "PR-2015-00810 Stage 1 Release_paginated.pdf," "was unable to determine that the records were *not* public records." CP 220 (emphasis in original). Tapper did not make a determination that any of the records *are* public records. *Id.*

On April 25, 2016, SEIU 925 filed a Complaint, Summons, and Motion for a TRO, with supporting documents, to temporarily enjoin release of "PR-2015-00810 Stage 1 Release_paginated.pdf." CP 1-27. The Foundation requested that SEIU 925 and UW enter into an agreement in which the records would not be released until after a hearing, unless the Court enjoined release. CP 62-64. The parties reached such an agreement. *Id.* After the original judge assigned to the case recused himself, the parties entered into a new agreement. Appendix A, B.

On June 10, 2016, the trial court heard oral argument on SEIU 925's Motion for a Preliminary Injunction, following submission of briefing and supporting declarations from all parties. CP 393-490. SEIU 925 asserted that the documents at issue did not relate to the conduct of government or to the performance of a governmental or proprietary function, and thus did not meet the definition of "public record" under the PRA. CP 87-90. SEIU 925 also argued in the alternative that exemptions to disclosure applied, and that UW would commit a ULP by releasing the records. CP 90-93. SEIU 925 frankly declared that some documents

contained in "PR-2015-00810 Stage 1 Release_paginated.pdf" were probably public records with no applicable exemptions, but given the volume of material, all such documents had not been identified. CP 84, 399. Additionally, SEIU 925 asserted that UW should be required to make a determination whether the documents it intended to release are "public records." CP 406-07, 409-10. UW admitted it had not made a determination that the records were public records. CP 211, 424, 426-432.

The trial court granted a TRO enjoining UW from releasing "PR-2015-00810 Stage 1 Release_paginated.pdf," and requiring the "public records" portion be released by July 6, 2016, and SEIU 925 "on or before July 6, at 5:00 pm set a hearing before the court to show by affidavit cataloging and describing with sufficient particularity as to the status of the records as public or not public records." CP 267-70.

In compliance with the trial court's order, SEIU 925 cataloged the documents contained in "PR-2015-00810 Stage 1 Release_paginated.pdf," subsequently filing declarations identifying 102 pages of public records for release and categorizing the remaining non-public record documents in one or more of the following categories:

- emails and documents about faculty organizing including emails containing opinions and strategy in regard to faculty organizing and direct communication with SEIU 925;
- postings to the AAUP UW Chapter listserver;

- personal emails and/or documents unrelated to any UW business;
- personal emails sent or received by Professor Wood in his capacity as AAUP UW chapter president and unrelated to UW business.

Appendix D (Metzger, Dale, Layton, and Lather Decs.). UW released the 102 pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" identified as public records to the Foundation on July 6, 2016. Appendix D (Kussmann Dec., Exh. M). The non-public records remaining after release of the 102 pages are the "documents at issue" in this case.

On August 6, 2016, the trial court considered the parties' further briefing and declarations, heard oral argument, and entered a preliminary injunction, finding the documents identified as non-public records were not "public records" subject to disclosure. CP 291-97. On October 12, the trial court denied reconsideration of its preliminary injunction. CP 313-14.

On March 24, 2017, following briefing by the parties, the trial court heard oral argument on SEIU 925's Motion for Summary Judgment and Permanent Injunction. VRP 1-101. SEIU 925 argued that the documents at issue are personal and private and thus not "public records" under the PRA, because they do not relate to the conduct of government or a governmental or proprietary function. CP 322-27. SEIU 925 also asserted in the alternative that PRA exemptions preclude disclosure of some of the material. CP 327-30.

On March 27, the trial court entered a permanent injunction enjoining release of the documents at issue because they are not "public records" under the PRA. CP 686-96. The judge did not reach SEIU 925's unfair labor practice ("ULP") claims in the Complaint, including its request for "[a]n order finding that UW committed an unfair labor practice by stating that it intends to release material in the document identified by it as 'PR-2015-00810 State 1 Release_paginated.pdf.'" *Id.*; CP 12, 14.

The Foundation filed a Notice of Appeal with the Court of Appeals, Division I on March 27.

Given that the case was scheduled to go to trial on April 24, 2017, during the week of March 27, SEIU 925's attorney Jacob Metzger spoke with UW's attorney Robert Kosin, discussing the ULP cause of action in the Complaint. CP 823. Kosin articulated to Metzger UW's position that this cause of action remained and was scheduled for trial CP 718, 823. On March 31, Metzger spoke with Kosin, who confirmed that UW agreed with SEIU 925 that the trial date should be continued or stayed until after a decision from the Court of Appeals, and UW did not object to continuing or staying the trial date. CP 718, 823. Metzger also contacted the Foundation's attorney, Stephanie Olson, who indicated the Foundation did not wish to proceed to trial on April 24. CP 823-25. Metzger then contacted the trial court's bailiff to inquire whether a motion to continue

the trial date was necessary. CP 825 The bailiff responded stating "Yes, please submit a motion and order to the Court." CP 825.

SEIU 925 and UW – the parties with interests in the ULP allegations – filed a Joint Statement of Trial Readiness on April 3, 2017, per the Order Setting Case Schedule. Appendix E. SEIU 925 also filed a Motion to Change Trial Date and For Stay of Proceedings on April 3, requesting that the trial date be changed or stayed pending the outcome of the appeal. CP 719-22. On April 4, this Court issued a perfection schedule in the Foundation's appeal. On April 6, the Foundation filed a Combined Motion to Strike and Motion for Sanctions. CP 723-33.

On April 17, the trial court denied the Foundation's Combined Motion to Strike and Motion for Sanctions and granted SEIU 925's Motion to Change Trial Date/Stay Proceedings, staying the matter and continuing the trial until October 23. CP 844-57. In denying the Foundation's motion, the trial court found that "the status of the Court's last order and its effect on finality is honestly debatable." CP 845.

IV. ARGUMENT

A. The trial court properly entered a permanent injunction enjoining disclosure of the documents at issue because they are not "public records" as defined in the PRA.

1. Burden of Proof, Standard of Review, and Permanent Injunction Standard

SEIU 925 does *not* have the burden of proof on whether a document is a public record. *Dragonslayer, Inc. v. Washington State Gambling Commission,* 139 Wn.App. 433, 441, 161 P.3d 428 (2007); *Belenski v. Jefferson County,* 187 Wn.App. 724, 733 FN 5, 350 P.3d 689 (2015), *rev'd on other grounds,* 186 Wn.2d 452 (2016). While a party seeking to block disclosure of a public record has the burden of proof, "this burden of proof applies only when a party seeks to disclose *a public record.*" *Dragonslayer,* 139 Wn.App. at 441 (emphasis added); *see also Belenski,* 187 Wn.App. at 733 FN 5. It does not apply to the threshold inquiry about whether a document is a public record. *Dragonslayer,* 139 Wn.App. at 441; *Belenski,* 187 Wn.App. at 733 FN 5.

The standard of review in a PRA case is de novo. *Nissen v. Pierce County,* 183 Wn.2d 863, 872, 357 P.3d 45 (2015).

To obtain an injunction, a plaintiff must show: (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) the acts complained of are either resulting in or will result in actual and substantial injury to plaintiff. *SEIU Healthcare 775 v. Dept. of Social and Health Services,* 193 Wn.App. 377, 339, 377 P.3d 214 (2016), *rev. denied,*186 Wn.2d 1016, 380 P.3d 502 (2016). As set forth in Section IV.A.3., SEIU 925 has a clear legal and equitable right to prevent the disclosure of the documents at issue, because they are not public records

subject to PRA release. Additionally, SEIU 925 and Professor Wood have a well-grounded fear of immediate invasion of this right because UW has declared it will release the documents at issue to the Foundation absent an order enjoining it from doing so. CP 120-21, 154, 215. Furthermore, release of information would significantly harm SEIU 925 and Professor Wood. CP 97-98, 104-05. Release would chill participation of SEIU 925 members and other faculty in union organizing. CP 97, 104-05. Release would reveal private communications regarding union organizing not intended to be released publicly. CP 97, 104-05. Release of the AAUP listserver emails would impair the ability of faculty to freely discuss issues on a private organization's listserver, and interfere with faculty's right to select a representative of their own choosing. CP 97-98, 104-05. Finally, release of personal emails of Professor Wood would harm him. CP 105. The Foundation's stated aim of de-funding public sector unions and targeting SEIU and its locals compounds these harms. CP 96-97. Thus, SEIU 925 satisfies all three requirements to obtain temporary, preliminary, and permanent injunctions.[3]

2. SEIU 925 has standing on its own and on behalf of Professor Wood.

[3] The Foundation asserts that RCW 42.56.540 applies to this case; however, that statute only applies to enjoining *public* records (not non-public records) from disclosure thus its requirements do not apply here. *Dragonslayer,* 139 Wn.App. at 441.

SEIU 925 brought this action on its own behalf and on behalf of its member, Professor Wood. CP 1, 672.[4] SEIU 925 has standing to bring this action on behalf of Professor Wood under *Int'l Ass'n of Firefighters v. Spokane Airports,* 146 Wn.2d 207, 213-14, 45 P.3d 186 (2002), which sets forth the following requirements for associational standing: (1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither claim asserted nor relief requested requires the participation of the organization's individual members. Here, Professor Wood would have standing to sue in his own right as the documents at issue are his records; the interests SEIU 925 seeks to protect are germane to its purpose of organizing faculty and providing representation to members and individuals it represents [CP 96]; and Professor Wood's participation is not required, as set forth in greater detail below. However, in fact, while Professor Wood is not a party in this action, he participated in other ways. He submitted a declaration in support of injunctive relief [CP 99-154], and appeared at the permanent injunction hearing [VRP 1, at 6]. UW agrees SEIU 925 has standing to bring this action on behalf of Prof. Wood. CP 471.

[4] Contrary to the Foundation's contention [Foundation Opening Brief, 17], SEIU 925 has standing to challenge release of all the documents at issue on its own behalf. Beyond emails regarding union organizing, the other documents name and pertain to SEIU 925, which includes its member. CP 35, 97, 104.

The Foundation asserts that "[a] party relying on associational standing cannot conduct litigation in a way that harms the interests of those it claims to represent" [Foundation Opening Brief, 15], citing *Hunt v. Washington State Apple Advertising Commission,* 432 US 333, 342-43, 97 S.Ct. 2434 (1977); *Save a Valuable Environment v. City of Bothell,* 89 Wn.2d 862, 867, 576 P.2d 401 (1978); and *Int'l Assn. of Firefighters v. Spokane Airports,* 103 Wn.App. 764, 768, 14 P.3d 193 (2000).[5] Foundation Opening Brief, 15. None of those cases actually stand for that principle.

In *Hunt,* the U.S. Supreme Court held that the Washington State Apple Commission had standing to challenge a North Carolina statute regulating the labeling of apples sold in the state, despite that the Commission is a state agency and not a traditional trade association. 432 U.S. at 335, 345. The Court explained that an association can be an "appropriate representative of its members." *Id.* at 342-43 (internal citations omitted). The Court held that declaratory or injunctive relief necessarily benefits an association's members. *Id.* The "harm" analysis in *Hunt* focuses on the injury to apple growers as a result of the North Carolina statute (not the litigation brought by the Commission). *Id.* at 342-

[5] The Foundation's brief cites to the *Int'l Firefighters* appellate decision, but the case was appealed to the Washington State Supreme Court. The appellate court analyzed the standing issue similarly to the Supreme Court.

43. Thus, *Hunt* supports associational standing here, where SEIU 925 seeks injunctive relief, which would benefit Professor Wood. *See also Save,* 89 Wn.2d at 868 (nonprofit has standing on behalf of members to sue to protecting environmental rights, where it demonstrated "one or more of its members are specifically injured by a government action").

The *Int'l Firefighters* court explained the following with respect to the third requirement of associational standing:

> [It] is not, however, constitutionally based and *is judicially self-imposed for "administrative convenience and efficiency*, not elements of a case or controversy within the meaning of the Constitution." Division Three observed this distinction in holding that the ultimate question is "*whether the circumstances of the case and the relief requested make individual participation of the association's members indispensable*."

146 Wn.2d at 215. The Court noted the difference between monetary damages and injunctive relief in analyzing this requirement, because monetary damages may require individualized proof whereas injunctive relief does not. *Id.* at 214. *Int'l Firefighters* also supports associational standing here given the injunctive relief being sought and the lack of need for Professor Wood's participation as a party.

Additionally, this litigation is not being conducted in a way that harms the interests of Professor Wood. SEIU 925 vehemently contests the Foundation's assertion – based on conjecture and speculation at best – that Professor Wood violated ethics laws. Despite the Foundation's assertion

that 3,800 emails are at issue, many of the documents are duplicates, and, while in Professor Wood's records, were merely received by him. CP 102, Appendix D (Metzger, Dale, Layton, and Lather Decs.). Some are emails sent from or received by Professor Wood's non-UW email address. CP 104. The Foundation's characterization of the ethics laws is skewed and misses the complexities of RCW 42.52 et seq. As one example, within the "Ethics in Public Service Act," RCW 42.52.220 explicitly provides that universities may develop administrative processes for "university research employees" – employees, like Professor Wood, engaged in research – that apply in place of RCW 42.52.120, the statute cited by the Foundation. Finally, Professor Wood and SEIU 925's interests are aligned: both have an interest in preventing the release of non-public records.

3. The documents at issue are not public records subject to disclosure under the PRA because they do not relate to the conduct of government or the performance of a governmental or proprietary function.

Only "public records" as defined in the PRA are subject to disclosure; non-public records are not subject to disclosure. RCW 42.56.070(1); *Dragonslayer*, 139 Wn. App. at 444 ("[t]he determination of whether a document is a 'public record' is critical for the PDA's purposes because the act applies only to public records"), citing *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 564 FN 1, 618 P.2d 76

(1980); *Smith v. Okanogan County*, 100 Wn. App. 7, 11, 994 P.2d 857 (2000); *Belenski,* 187 Wn.App. at 733.

A "public record" is "[1] any writing [2] containing information relating to the conduct of government or the performance of any governmental or proprietary function [3] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3). "All three elements of this three-pronged test must be satisfied for a record to be a public record." *Dragonslayer*, 139 Wn. App. at 444, citing *Oliver,* 94 Wn.2d at 564 FN 1.[6]

"The legislative intent of the PDA is to require public access to information *concerning the government's conduct*." *Id.* at 445 (emphasis added); *see also Comaroto v. Pierce County Medical Examiner's,* 111 Wn.App. 69, 72, 43 P.3d 539 (2002). "The basic purpose and policy of RCW 42.17 [the previously-codified PRA] is to allow public scrutiny of government, *rather than to promote scrutiny of particular individuals who are unrelated to any governmental operation*." *Id.* at 72 (emphasis added).

Emails sent and received in an individual and personal capacity regarding union organizing of faculty, a private, non-profit organization, and other personal and private emails do not satisfy the second prong of

[6] The Foundation implies that because UW electronic use policies state that there is no expectation of privacy on UW email, such email becomes a public record. Again, as articulated herein, that is not the standard; the standard is the three-part definition of "public record."

the definition of "public record" because they do not relate to the conduct of government or the performance of any governmental or proprietary function. Therefore, they are not public records subject to disclosure. Instead, contrary to the PRA's mandate, the disclosure of such emails scrutinizes particular individuals unrelated to government action.

a. *For a record to be a public record, it must have some actual – not purely speculative – relation to the conduct of government or a governmental or proprietary function.*

Where there is no actual – as opposed to purely speculative – relation of a record to the conduct of government or a governmental or proprietary function, the document is not a public record, despite the PRA's broad mandate favoring disclosure. *Tiberino v. Spokane County Prosecutor*, 103 Wn.App. 680, 688, 13 P.3d 1104 (2000); *Dawson v. Daly,* 120 Wn.2d 782, 788, 845 P.2d 995 (acknowledging broad mandate favoring disclosure in PRA, verification of employment of deputy prosecutor, including his position, salary, and length of service, do not relate to the conduct of government or the performance of any governmental function and therefore are not public records under the PRA); *Dragonslayer,* 139 Wn.App. at 445; *Forbes v. City of Gold Bar,* 171 Wn.App. 866, 288 P.2d 382 (2012), *rev. denied,* 177 Wn.2d 1002 (2013) (emails of city council members on city email and city servers

sorted by consultant as "not conduct of government" are personal and not related to the conduct of government or a governmental or proprietary function);[7] *Yakima Newspapers v. Yakima,* 77 Wn.App. 319, 324, 890 P.2d 544 (1995) (settlement agreement regarding dispute over fire chief's performance as fire chief is a public record, only because relates to governmental and proprietary functions of termination and provision of fire services); *Nissen,* 183 Wn.2d at 878 (cell phone call and text message logs are not public records, absent an allegation that county used them; text messages not created within employee's "scope of employment" are not related to conduct of government and therefore are not public records under the PRA); *West v. Vermillion,* 196 Wn.App. 627, 642-42, 384 P.3d 634 (2016), *rev. denied,* 187 Wn.2d 1024, 390 P.3d 339 (2017).[8] Further, "[r]ecords an employee maintains in a personal capacity will not qualify as

[7] In *Forbes*, "the city contracted with Michael Meyers to build a server and configure a domain based network to centrally locate city related documents....the *city's e-mail* flowed through GoDaddy.com POP3 mail servers and downloaded directly to users' personal computers. Because of the configuration of the *city's system*, e-mails had to be downloaded as personal storage table (PST) files....Meyers accessed several e-mail servers, both *at the city* and from other private exchanges." 171 Wn.App. at 861-62 (emphasis added).

[8] The Foundation incorrectly asserts that "[w]hen presented with the threshold question of whether the records at issue qualify as 'public records,' every Washington appellate court has held in the affirmative" with one exception (*Forbes*). Foundation Opening Brief, 20. The Foundation conveniently ignores that at least three other courts (*Dawson, Nissen,* and *West)* found records at issue *not* to meet the definition of public records [120 Wn.2d at 789, 83 Wn.2d at 882-83; 196 Wn.App at 642-43], and the *Dragonslayer* court did not make a finding that the records at issue were public records. 39 Wn.App. at 445-46.

public records, even if they refer to, comment on, or mention the employee's public duties." *Nissen,* 183 Wn.2d at 880 FN 8.[9]

In *Tiberino,* a county prosecutor office secretary was terminated in part for use of work email for personal purposes, on her work computer. 103 Wn.App. at 683. After the secretary threatened litigation, the county printed her non-work emails. *Id.* at 685. These emails did not become public records until they were used for a proprietary function: preparing for litigation over the secretary's termination. *Id.* at 688.

Similarly, internet access logs ("IALs") are public records only because they record *work-related* internet use on a county-owned computer, and employees use the internet to carry out their work. *Belenski,* 187 Wn.App. at 735-6. Because the trial court found IALs were not public records, the appellate court "*did not consider whether any part of the requested information might be 'purely personal in nature'*" 187 Wn.App. at 725, FN 8; *see also id.* at 737-38. Thus, the court would have considered personal information on the IALs *not* to be a public record.

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[9] Judge Mary Yu, while a King County Superior Court judge, made a similar finding in a similar case. In *Rosen v. University of Washington,* No. 13-2-26176-6, she permanently enjoined release of emails of Dr. Gerald Rosen – a UW volunteer clinical professor in the Department of Psychiatry and Behavioral Sciences – on his UW email, as non-public records, including emails related to *academic* articles or papers he wrote on psychiatry topics, a book on post-traumatic stress disorder he co-edited, and an exchange of ideas on nightmares and anxiety disorders, even where these pursuits *listed Dr. Rosen's affiliation with UW.* CP 676-685, VRP 70.

In *Dragonslayer*, the Gambling Commission (a government entity) asserted financial statements in the possession of the Commission contained information the Commission "reviews, uses, and retains for its enforcement purposes" and "information the Commission uses to educate the public." 139 Wn.App. at 442. The trial court found the records relate to regulatory functions of the Commission. *Id.* at 445. But, while acknowledging the PRA's broad mandate favoring disclosure, the appellate court reasoned there was no detailed information on how the financial statements "aid in 'monitoring compliance with state gambling laws and regulations'" and thus remanded to the trial court to examine that issue, because "[a]dditional factual findings as to how the Commission uses [the documents at issue] are necessary to determine whether they are related to a public function. *These findings should be based on specific determinations of the Commission's use, rather than general assertions that the financial statements are used.*" *Id.* (Emphasis added.)

Nissen and *West's* holdings are not limited to private devices and accounts. *Nissen,* 183 Wn.2d at 878 ("For information to be a public record, an employee must prepare, own, use, or retain it *within the scope of employment.* An employee's communication is 'within the scope of employment' only when the job requires it, the employer directs it, or it furthers the employer's interests.") (emphasis in original); *West,* 196

Wn.App. at 641 ("a record is subject to disclosure under the PRA if it is 'a record that an agency employee prepares, owns, uses, or retains in the scope of employment'"). The *Nissen* court articulated that the relevant factor is not how or where a record is stored, but what it contains and its relationship to government conduct. 183 Wn.2d at 880.

In a case involving emails on a public server capturing union communications during heated contract negotiations being reported in the media, a Michigan Court of Appeals held such emails are personal and not subject to disclosure under the Michigan Freedom of Information Act ("FOIA"). *Howell Education Association v. Howell Board of Ed.,* 287 Mich.App. 228, 231, 246, 789 N.W.2d 495 (Mich. 2011), *leave to appeal denied,* 488 Mich. 1010, 791 N.W.2d 719 (2010), *reconsideration denied,* 489 Mich. 976 , 798 N.W.2d 767 (2011). The court found the emails:

> [D]o not involve teachers acting in their official capacity as public employees, but *in their personal capacity* as [union] members or leadership. Thus, *any emails sent in that capacity are personal....The release of emails involving internal union communications would only reveal information regarding the affairs of a labor organization, which is not a public body.*

Id. at 246 (emphasis added). The Michigan FOIA defines "public record" similarly to the PRA. *Howell,* 287 Mich.App. 228.

Additionally, a federal court, *NLRB v. Gallant,* 26 F.3d 168, 171-2, 146 L.R.R.M. 2633 (D.C. Cir. 1994), found National Labor Relations

Board ("NLRB") member Mary Cracraft's correspondence (stored in her NLRB office) relating to her re-nomination as a NLRB member to constitute personal records not subject to disclosure under the federal Freedom of Information Act.[10] Some of this correspondence was on NLRB letterhead, some was sent as NLRB franked mail, and some via an NLRB fax machine. *Id.* at 171. At one point Cracraft's NLRB secretary organized the correspondence for her, but the correspondence was still found to be personal records not subject to disclosure *Id.*

The four categories within the documents at issue are not public records as defined by the PRA. First, Professor Wood's emails and documents about faculty union organizing, sent and received in his personal capacity as a union member, including emails containing opinions and strategy regarding faculty organizing and direct communications with SEIU 925, are not public records. They have no actual relation to the conduct of government or the performance of a governmental or proprietary function, including preparing for litigation over an employee's termination (as in *Tiberino*) or settling a dispute over job performance related to the provision of government services (as in *Yakima*). They are personal and private discussions, sent and received in Professor Wood's personal capacity involving personal and private

[10] Cases interpreting the federal FOIA are instructive in interpreting the PRA. *Forbes*, 171 Wn.App. at 866. *Nissen* favorably cites *Gallant*. 183 Wn.2d at 885.

deliberations about whether to join a private organization. Where, as in *Dawson,* verification of government employment is not related to the conduct of government, these emails cannot be. And, under the holdings of *Nissen* and *West,* they were not created within the scope of Professor Wood's employment, as his job does not require involvement with union organizing, he was not directed by UW to be involved with union organizing, and his involvement does not further UW's interest.[11] These emails are analogous to the internal union emails sent on school district computer servers found *not* to be public records by the *Howell* court in Michigan, even where that union was engaging in heated negotiations with the government. They relate to *potential* unionization of UW faculty, involving a union not currently recognized as the collective bargaining agent of faculty. Mere discussions about the possibility of unionization at a public university, sent and received in a personal capacity, are not related to the conduct of government or the performance of a governmental or proprietary function. UW's attorney admitted UW faculty perform work "that is not necessarily related to the functioning of the University." CP 471. Additionally, these communications about union

[11] Professor Wood's eight-page professional resume does not contain any reference to union organizing but does contain significant information about his research and other work at UW. CP 104-14. Similarly, a UW Atmospheric Sciences professor job posting makes no mention of a union or union organizing. CP 116-18. Professor Wood also states that his activities as a member of SEIU 925 are not part of his job duties and responsibilities at UW. CP 101.

organizing cannot constitute public records, where, under federal case law, the correspondence of a NLRB member relating to her re-appointment to her government position is not.

Second, postings to the AAUP UW chapter listserver and personal emails sent or received by Professor Wood in his personal capacity as AAUP UW chapter president and unrelated to UW business are not public records. Similar to emails on union organizing, they relate to the affairs of a private 501(c)(6) non-profit organization and are expressly unrelated to UW business by definition. CP 100. As such, they cannot be categorized as public records under the PRA. The AAUP's private nature and distinct identity from UW is underscored by the fact that participation in the AAUP UW chapter listserver is not limited to UW faculty or employees and includes people outside of the UW community. CP 100. Additionally, the documents at issue were not sent or received by Professor Wood in his capacity as a UW employee, but rather in his personal capacity as the President of the UW AAUP and are unrelated to the conduct of government or the performance of a governmental or proprietary function.

Finally, Professor Wood's other personal emails and/or documents unrelated to UW business are simply that: non-public records, and are analogous to the personal emails not subject to release in *Forbes,* and which would not have been deemed public records in *Tiberino* except for

the fact that they were relied upon in an employee's discharge, a proprietary function.

The Foundation cites WAC 44-14-03001(2) for the proposition that records on an agency's server are presumptively public unless purely personal. Foundation Opening Brief, 18. However, that WAC is advisory only *and nonbinding*. WAC 44-14-00001; WAC 44-14-00003. Therefore, it cannot trump the definition of "public record" in the PRA, which requires that, in addition to meeting the definition's third prong (which relates to records on an agency server), the second prong must be satisfied, i.e. a record must relate to the conduct of government or the performance of a government or proprietary function.[12]

The Foundation asserts "no party claims that the UW e-mails are purely personal in nature." Foundation Opening Brief, 22. In fact, SEIU 925 does assert and has asserted the documents at issue are personal and private.[13] CP 83-94, 315-335. For the first time, the Foundation apparently argues that for a document not to be a public record, it must be described with the magic words "purely personal" and that categorizations

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[12]*See, e.g., Tiberino,* 103 Wn.App. at 688; *Belenski,* 187 Wn.App. at 735 FN 8, 737-37. And, some of the documents at issue are emails to or from Professor Wood's private email address, not on a government server. CP 111, 114.

[13] The Foundation is wrong in stating the only type of email UW exempts from its purported de minimus policy is "Honey, I'm going to bring home the milk." Foundation Opening Brief, 10. In fact UW also cited emails regarding "March Madness" basketball as non-public records. VRP 40:20-42:4.

describing purely personal documents, such as "personal emails… unrelated to any UW business" constitute public records because the magic word "purely" is absent from the categorization. This contravenes established statutory and case law authority. What differentiates a public record is not the inclusion of the words "purely personal" in the description, but instead whether the document relates to the conduct of government or the performance of a governmental or proprietary function. That SEIU 925's categorizations did not specify emails about union organizing and the AAUP were "purely personal" does not render them public records, where they are not related to the conduct of government or the performance of a governmental or proprietary function.

The cases characterizing personal emails as non-public records do not describe in detail the content of the emails. In *Tiberino*, the emails at issue were characterized as "purely personal" by Tiberino, the party seeking to block disclosure, but nothing further was explained about their content, other than that they were to her mother and sister, and that she was using email "for non-business purposes." 103 Wn.App. at 684-85, 689. Additionally, in *Forbes,* emails sorted as "not conduct of government" were considered the purely personal emails of government officials, and were not public records, implying that all records unrelated

to the conduct of government are purely personal. *Forbes,* 171 Wn.App. at 864, 868.

Because the records at issue here do not relate to the conduct of government or the performance of a governmental or proprietary function, they are non-public records not subject to PRA disclosure.

b. Where courts have found records to be public records, they require a much closer relationship to the conduct of government or a proprietary function of government than exists here.

Where Washington courts have found records to be public records, there is a clearly articulated link to the conduct of government or the performance of a governmental or proprietary function. Such a link does not exist for the documents at issue here, as distinguished from the following categories of records.

- Records involving the performance of the governmental or proprietary functions of engaging in settlement discussions over an employee's discharge related to performing duties that are a government function and preparing for litigation related to the termination of an employee.

In *Tiberino,* as described above, a secretary's personal emails stored on a work computer were not public records until they were used for a proprietary function of government: preparing for litigation over her termination. *Id.* Similarly, in *Yakima Newspapers,* 77 Wn.App. at 324, a settlement agreement became a public record only because the city's

termination of its fire chief is a proprietary function, the settlement agreement contains terms of the settlement of a dispute over the fire chief's performance, and his job performance directly relates to the provision of fire services, a government function. Here, the documents at issue are vastly different from the documents in *Tiberino* and *Yakima*. They do not in any way relate to an employee's termination (let alone a settlement of or litigation over it) or any other proprietary employment function of UW. The documents at issue here do not relate in any way to the provision of a governmental or proprietary function.

- Documents actually used by a prosecutor, law enforcement, public utility district, or city port.

Where a government entity uses records, those records have been found to be public. *Jane Does v. King County,* 192 Wn.App. 10, 23, 366 P.3d 936 (2015) (surveillance videos used by the King County Prosecutor's Office, a government agency, to investigate a crime, a government function, are public records);[14] *Comaroto,* 111 Wn.App. at 73-74 (suicide note relates to conduct of government or a governmental or proprietary function only because law enforcement "gathered and

[14] The Foundation asserts that *Does* stands for the general proposition that "public records" under the PRA are not limited to those that show government action. Foundation Opening Brief, 19. However, *Does* mandates that where a record does not show government action, the government must actually use the record for it to be a "public record." 192 Wn.App at 22-23. Here, there is no evidence the documents at issue show government action, or that the government used the records, thus they are not public records under *Does.*

temporarily retained the note before delivering it to the medical examiner's office, a government agency, to investigate and to determine the cause of...death, a government function"); *Concerned Ratepayers v. PUD No. 1,* 138 Wn.2d 950, 953, 958-59, 983 P.2d 685 (1999) (design specifications of turbine generator component of public power plant are public records, only where used by public utility district); *Servias v. Port of Bellingham,* 127 Wn.2d 820, 828, 904 P.2d 1124 (1995) (cash flow analysis is public record, only where prepared for and retained by Port of Bellingham for use by the Port in negotiations); *Confederated Tribes v. Johnson,* 135 Wn.2d 734, 748, 958 P.2d 260 (1998) (State Gambling Commission records reflecting amount of Native American tribe's "community contribution," paid under a tribal-state gaming compact are public records, where Commission negotiates, renegotiates, and enforces compacts on behalf of citizens of Washington, distributes community contributions to impacted governmental agencies, and relies on and uses the information in the records requested). Here, emails on union organizing, the AAUP UW chapter, and personal and private emails of a professor have not been used by UW, do not reflect government action, nor were they relied upon by UW or any other governmental agency in the performance of any governmental or proprietary function. Thus, they do not fit this category.

- Records produced within the scope of an employee's employment, unrelated to the performance of job duties.

A document is a public record if used within an employee's scope of employment. *Nissen,* 183 Wn.2d at 878; *West,* 196 Wn.App. at 641; *see also Belenski,* 187 Wn.App at 735 (internet access logs of county employees are public records because employees use the internet *to perform their job tasks,* and there was no argument any of the records contained non-work related internet use). The records at issue here were sent and/or received in Professor Wood's personal capacity and were not created within the scope of his employment and thus are not public records.

- Records involving the performance of a government service by a government entity.

Patient medical records have been found to be public records only because they contain information *prepared and maintained by a public hospital* related to its "administration of public health care services, facility availability, use and care, methods of diagnosis, analysis, treatment and costs, all of which are carried out or relate to the performance of a government or proprietary function." *Oliver,* 94 Wn.2d at 566. Here, the documents at issue do not fall within this category as they do not involve the performance of a government service by a government entity.

- Records of metadata or created by entity acting as the functional equivalent of government.

The documents at issue here also do not fall within this category; they were not created for and applied to a governmental purpose, and there is no argument they are not public records because they constitute metadata. *See Cedar Grove Composting, Inc. v. City of Marysville,* 188 Wn.App. 695, 717-19 (2015) (records created by non-government entity acting as the functional equivalent of a government agency are public records, where they were created for and applied to a clear governmental purpose: resolving odor issues allegedly caused by a composting facility); *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010) (metadata is public record, where it relates to the conduct of government).

Thus, Washington courts have required a relation to the conduct of government or the performance of a governmental or proprietary function for a record to be a public record; no such relation exists here.

c. The documents at issue are not "public records" for any of the reasons articulated by the Foundation.

The Foundation provides four purported reasons why the documents at issue are public records. None of these satisfies the second prong of the "public record" definition because none articulates a sufficient relation to the conduct of government or the performance of a governmental or proprietary function.

First, the Foundation states that because government employment is a proprietary function of government, and discussions about labor organizing of public employees relate to government employment, emails regarding union organizing are public records, citing to *Tiberino* and *Yakima*. However, neither of those cases actually holds that everything about or possibly related to government employment is a proprietary function of government. Rather those cases found the "proprietary function" portion of the second prong of the definition is met where a government entity *acts* to prepare for litigation related to an employee's termination or settle a dispute over an employee's job performance, where such performance relates to the provision of a government service. *Tiberino,* 103 Wn.App. at 688; *Yakima Newspapers,* 77 Wn.App. at 324. Significantly, not everything related to government employment is a proprietary function. *Dawson v. Daly,* 120 Wn.2d at 845 (requests for verification of a public employee's employment, including position, salary, and length of service are not public records). Here, documents sent or received in Professor Wood's personal capacity about potential union organizing for a union that is not currently certified or recognized, and email about a private professional organization that may discuss "Faculty Issues and Concerns" as well as other topics do not relate to UW conduct regarding a professor's employment or any other proprietary UW

function.[15] Additionally, at this point in time, nothing about these union organizing emails actually bears a relation to government employment: there is no union negotiating a contract, filing grievances, or engaging in any activities that actually impact government employment. The Foundation's arguments based on the faculty union's potential future representation as the exclusive bargaining representative of UW faculty are purely speculative because no bargaining representative relationship exists. Emails regarding other personal and private matters also do not relate to government employment.

The Foundation next asserts that records containing information related to the provision of public education relate to government conduct, because public education is a public function, citing not to any PRA cases but to RCW 28B.07.010 and RCW 41.76.010(2). RCW 28B.07.010 is a section of the Washington Higher Education Facilities Authority, which deals with *private* non-profit higher education institutions.[16] Assuming that the actual provision of public education at UW is a governmental or

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[15] While the Foundation asserts that the two AAUP categories relate to "faculty concerns with public-sector employment" there is no evidence that all the emails on the listserver – let alone those emails sent or received by Professor Robert Wood in his personal capacity as AAUP UW chapter President relate to faculty concerns over *public sector employment,* or even faculty concerns generally.

[16] *See, e.g.,* RCW 28B.07.010 ("Washington's independently-governed private nonprofit higher education institutions are a necessary part of the state's higher educational resources."). This is the sentence immediately following the provision cited by the Foundation. Foundation Opening Brief, 24. *See also* RCW 28B.07.020 ("'Higher education institution' means a private, nonprofit educational institution").

proprietary function, such function – as with government employment – deals with the government acting in its capacity as provider of public education, not anything remotely related to the provision of public education, as argued by the Foundation. Thus, the documents at issue are not sufficiently related to the provision of public education. They relate to discussions about union organizing by individuals, in their individual and personal capacity for a union that is not currently certified, and to a private professional organization. RCW 41.76.010(2) does address the scope of bargaining for public sector faculty in Washington once unionized. However, the idea that private discussions by individuals in their individual capacity about union organizing (where a union is not yet certified or recognized) automatically relate to the provision of public education because they could at some point in the future impact faculty salaries, appointment, promotion, evaluation, and tenure does not mean that at this point in time such discussions by individuals in their individual capacity relate to the provision of public education or the conduct of government. That some emails relate to the UW AAUP, a private organization, and may discuss faculty issues and concerns and other topics does not make the emails about the *government's* provision of public education, where they were sent and/or received in Professor Wood's individual and personal capacity, not his capacity as a Professor in the

Department of Atmospheric Sciences at UW. Documents that were sent or received by Professor Wood in his capacity as a Professor of Atmospheric Science have already been identified and disclosed to the Foundation. Appendix D (Kussmann Dec., Exh. M).

The Foundation also asserts that the documents at issue relate to the proprietary function of government regarding collective bargaining, citing RCW 41.76 et seq. If the fact that the RCWs contain provisions regulating public sector unions transforms private discussions about a union into a public record, the same must be true for the discussions of individuals to associate with other entities or professions regulated by statute such as assisted living facilities (RCW 18.20 *et seq.*) or landscape architects (RCW 18.96 *et seq.*). A family's deliberations (even if communicated using one public email address) about whether an elderly member should live in a state-regulated but private assisted living facility, and what the family needs to do in order to place that family member there, are simply not public records. The Foundation also confuses the government's proprietary function of collective bargaining with the discussions between private individuals that may occur before any petition is filed; the latter do not involve government conduct.

Finally, the Foundation claims that records with information that "will necessarily affect state budgets and financing relate to government

conduct." Foundation Opening Brief, 26-27. Only when a union is actually formed and negotiating with a public sector employer – neither of which are present here – is there any *potential, not even actual,* impact on public budget. The case cited by the Foundation, *Harris v. Quinn,* 134 S.Ct. 2618 (2014) deals with currently certified unions. Furthermore, not everything related to state budgets and financing relates to government conduct. For example, someone's decision to purchase a car (and pay sales tax) positively impacts state budgets; however, emails about buying a car for private use (even if referenced in an email on a government server) do not relate to the conduct of government.

Thus, the Foundation's arguments lack merit and legal support.

4. SEIU 925's affidavits categorizing the documents at issue are sufficient to determine they are not public records.

A public records case "may be decided based on affidavits alone" and such affidavits are "accorded a presumption of good faith." *Forbes* 171 Wn.App. at 867, citing *O'Neill,* 170 Wn.2d at 153-54. Individuals can submit "'reasonably detailed, nonconclusory affidavits' attesting to the nature and extent of their search" to demonstrate records are not "public records" as defined by the PRA. *Nissen,* 183 Wn.2d at 855; *see also Forbes,* 171 Wn.App. at 862, 864, 866, 868 (affidavit of contractor who searched city council members' email accounts and categorized them as

"conduct of business" and "not conduct of business" sufficient to show "not conduct of business" documents are not "public records"). An affidavit may be completed by the person seeking to block disclosure. *Nissen,* 183 Wn.2d at 885.[17]

Here, Petitioner's declarations are sufficiently particular to determine whether a given document relates to the conduct of government or a governmental or proprietary function, and are much more particular than the sorting deemed sufficient in *Forbes.* SEIU 925's good faith declarations sorting the records at issue into descriptive categories, which sufficiently describe the content, is enough to make the determination that none of these categories of documents are public records under the PRA. Contrary to the Foundation's assertion, the trial court did not ignore the emails' content, as the categories describe the content. Further, the Foundation had mechanisms at the trial court – such as a motion for in camera review, including a spot check, to question SEIU 925's categorizations, which it did not pursue. Thus, it is estopped from asserting that SEIU 925's categorizations cannot be relied upon.

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[17] The Foundation incorrectly asserts that under the PRA, only the agency's categorizations carry weight. Foundation Opening Brief, 23. Here, UW never made, and in fact would not make, a determination as to whether the documents at issue are "public records" [CP 220], thus it was up to the party seeking to block disclosure to categorize the records and make that determination. In fact, SEIU 925 requested that UW categorize the documents, which it never did and opposed doing. CP 406-07, 409-10. Thus, SEIU 925, on its own behalf and on behalf of Professor Wood, was left with the task of categorization.

5. *The PRA does not require that ambiguities be resolved in favor of disclosure, but even if it did, the documents at issue are not public records.*

The cases cited by the Foundation in its claim that "any ambiguities in the duties of agencies must be resolved in favor of access to public records" do not actually make that statement. Foundation Opening Brief, 29-30. In fact, some of the cases cited by the Foundation deal only with whether *exemptions* to disclosure of document apply, where no party contests whether the document is a public record. *Progressive Animal Welfare Society,* 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (undisputedly public records only partially exempt from disclosure); *Hearst v. Hoppe,* 90 Wn.2d 123, 138-140, 580 P.2d 246 (1978) (same); *Yousoufian v. Office of Ron Simms,* 168 Wn.2d 444, 470, 229 P.3d 735 (2010) (penalties awarded where agency did not fully produce documents, where public record definition not raised). One case cited by the Foundation supports Respondent's argument here. That case found a court record is not a "public record" because courts are not agencies covered under the third prong of the definition of public record and "[e]ither the entity maintaining a record *is an agency under the PRA or it is not.*" *City of Federal Way v. Koenig,* 167 Wn.2d 341, 345-46, 217 P.3d 1172 (2009) (emphasis added). Thus, courts either find records to be public or not, and have not created an analytical step where, if the public record status of a

record is ambiguous, such ambiguity must be resolved in favor of disclosure. Despite a broad construction (which the Foundation attempts to transform into an "ambiguities" rule), the PRA provides a definition of "public record," which requires that the record relate to the conduct of government or the performance of a governmental or proprietary function, which is not met here.

Finally, the trial court did not find the public record status of the documents at issue to be ambiguous. Instead, the trial court explained that the determination of whether a record is a public record is fact-specific and that there are arguments that all the cases cited are distinguishable in one way or another from the facts before the Court. VRP 95:12-98:5.

B. The Superior Court properly entered a TRO and preliminary injunction, to preserve the status quo until a trial on the merits.

1. The Foundation's appeal of the TRO, Preliminary Injunction, and Order Denying Motion to Reconsider was not timely.

With some exceptions not relevant here, a Notice of Appeal must be filed within 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, and a Notice for Discretionary review must be filed within 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed or 30 days after entry of an order on a timely motion for reconsideration. Here, the Order

Granting TRO was entered June 10, 2016; the Order Granting Motion for Preliminary Injunction was entered September 23, 2016; and the Order Denying Defendant Freedom Foundation's Motion for Reconsideration was entered October 12, 2016.[18] The Foundation's Notice of Appeal of these orders was filed March 23, 2017, far outside the thirty day period allowed in the rules. Thus, the Foundation's appeal of these orders is not properly before this court. As set forth below, even if it is, the trial court did not err in entering a TRO and a preliminary injunction.

2. Burden of Proof, Standard of Review, and Injunction Standard.

SEIU 925 does not have the burden of proof on the issue of whether documents at issue are "public records" as defined in the PRA,[19] and the standard of review is de novo. *See* Section IV.A.1. The purpose of a preliminary injunction and a TRO is to "preserve the status quo until a trial court can conduct a full hearing on the merits." *SEIU 775,* 193 Wn.App at 392; *see also* CR 65, *Ameriquest Mortgage Co., v. Attorney General,* 148 Wn.App. 145, 157, 199 P.3d 468 (2009), *aff'd by Ameriquest Mortgage Co., v. Attorney General,* 170 Wn.2d 418, 241 P.3d 1245 (2010). "At a preliminary injunction hearing, the plaintiff need not

[18]While the Foundation included the trial court's Order Denying Defendant Freedom Foundation's Motion for Reconsideration in its Notice of Appeal, it did not brief this issue. Therefore it is waived, and SEIU 925 does not address it.

[19] *SEIU 775,* the case cited by the Foundation for the proposition that SEIU 925 has the burden of proof, did not address the definition of public record, but whether exemptions or prohibitions to PRA disclosure apply to *public records.* 193 Wn.App. at 284.

prove, and trial court does not reach or resolve, the merits of the issues underlying the three requirements for injunctive relief." *SEIU 775,* 193 Wn.App at 392-93. Rather, the trial court considers only *the likelihood that the plaintiff will prevail at trial* by demonstrating: (1) a clear legal or equitable right; (2) a reasonable fear of invasion of this right through disclosure; and (3) disclosure will result in substantial harm. *Id.; Ameriquest,* 148 Wn.App. at 157. SEIU 925 meets the three requirements for injunctive relief under the higher permanent injunction standard. *See* Section IV.A.1. Thus, it necessarily meets the lower preliminary injunction and TRO standard.

The Foundation claims several times that the trial court entering a TRO and a preliminary injunction delayed its right to the documents at issue. The Foundation cannot now make this claim, where: it did not appeal the TRO or preliminary injunction until *after* entry of the permanent injunction order; it did nothing to advance a decision on the merits for approximately five months, between October 2016 and its March 2017 response to SEIU 925's Motion for Summary Judgment and Permanent Injunction; and the trial court ultimately issued a permanent injunction enjoining release of the documents at issue.

3. A preliminary injunction was appropriate to enjoin release of the documents at issue to preserve the status quo until a

hearing on the merits, and the trial court did not err in applying Nissen.

Given that permanent injunctive relief enjoining release of the records at issue is appropriate, as set forth above, a preliminary injunction – which has a *lower* standard – is also proper.[20] The Superior Court appropriately relied upon *Nissen's* "scope of employment" test, as *Nissen's* holding is not limited to private devices. *See* Section IV.A.3.a.[21]

The Foundation characterizes *Forbes* as applying only to private devices. Foundation Opening Brief at 32. However, the facts of that case involve city email and city servers as well. *Forbes,* 171 Wn.App. at 861-62; *see also* Section IV.A.3.a. Here, the documents at issue include emails sent by or received on Professor Wood's private email address, contrary to the Foundation's contention [Foundation Opening Brief, 33]. CP 102, 104.

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[20] The Washington State Supreme Court has stated:

> We recognize that the exigent circumstances under which a preliminary injunction is issued frequently preclude the full development of a record which would suffice on appeal. Thus, we do not intend to discourage trial courts from issuing preliminary injunctive relief except upon the strongest evidence Injunctive relief frequently is required to maintain the status quo pending resolution on the merits, and there is neither the time nor opportunity to develop a complete record.

Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life, 106 Wn.2d. 261, 267, 721 P.2d 946 (1986). Thus, given the exigent circumstances here – release of records essentially mooting the case – a preliminary injunction was appropriate.

[21] Additionally, the Superior Court did not "later concede *Nissen* was distinguishable from this case and inapposite," as the Foundation contends. Foundation Opening Brief, 33-34. Instead, that Court on March 24, 2017 noted *Nissen* is distinguishable, but that "[o]n the other hand, they've got broad language in there that seems to imply that they're actually giving us some help understanding what the definitions are in the statute. What they really intended to do is anybody's guess, but what I need to do is figure out how to reconcile all of this in a way that makes logical sense." VRP 96:2-96:9.

Furthermore, in responding to PRA requests, UW treats employees as "custodians of record" and asks them to search for records in their control then turn them over to its public records office, not unlike an employee's search for emails or of their cell phone. CP 387-89. Thus, the trial court did not err in entering a preliminary injunction.

4. A TRO was appropriate to enjoin release of the entire document UW intended to release, to preserve the status quo and prevent release of non-public records.

As SEIU 925 meets the standard for a permanent injunction, it necessarily meets the lower TRO standard. The only difference in the injunction is the scope of records enjoined; the TRO enjoined an additional 102 pages of material identified by SEIU 925, per the trial court's order, as public records not subject to exemptions or prohibitions from disclosure. CP 267-70; Appendix D (Kussmann Dec., Exh. M). UW released this material to the Foundation on July 6, 2016, less than a month after the first hearing before the trial court in this case. Appendix D (Kussmann Dec., Exh. M).[22] The trial court's framework was proper, given the large volume of documents at issue,[23] the fact that UW never

[22] Even assuming for the sake of argument that the trial court should not have enjoined the material UW intended to release in its entirety, it is not clear what the remedy is, as the 102 pages were identified and released to the Foundation in less than a month.

[23] In light of the nearly 4,000 pages of material UW intended to release, SEIU 925 was not able to categorize with complete accuracy and specificity all the material prior to the first hearing, on June 10, 2016, but did its best to determine the nature of the documents and preliminarily characterize them. CP 84, 86, 99-184, 410-11. Professor Wood did not

made a determination as to the public record status of the material,[24] and the harm to SEIU 925 and Professor Wood from disclosure of non-public records, release of which would essentially render the case moot.[25]

Additionally, the TRO was not procedurally deficient or "standardless," as the Foundation asserts. In one of the cases it cites, *Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life,* 106 Wn.2d. 261, 265-66, 721 P.2d 946 (1986), the trial court judge did not specifically state that respondents were likely to prevail on the merits in its preliminary injunction order. While noting a trial court judge should ideally include such a conclusion, the court held that "we would elevate form over substance if we were to strike down the challenged injunction on this ground." *Id.* Thus, here, the fact that the trial court did not make certain findings in the TRO order does not mean the order was inappropriate to preserve the status quo until a hearing on the merits.

C. The Superior Court did not abuse its discretion in granting SEIU 925's Motion to Change Trial Date/Stay Proceedings,

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have the material UW intended to release until April 18, 2016. CP 102. The task of cataloguing the nearly 4,000 pages is enormous, particularly given that it took UW from January 28, 2016 to April 12, 2016 to complete it. CP 388-89.

[24]At the June 10, 2016 hearing, SEIU 925 asserted that UW should re-sort and categorize the documents it originally intended to release, properly identifying which are public records and which are not public records. CP 406-07, 409-10. However, UW asserted it was not in a position to do this and that the party seeking to block release was in the best position to do this. *Id.*

[25]Judge Mary Yu, while on the King County Superior Court, entered a similar order in a similar case, specifically finding that the documents enjoined by a TRO included "emails segregated between folders that contain public records and folders that do not contain public records." CP 49-50.

and in denying the Foundation's Combined Motion to Strike and Motion for Sanctions, because it did not lack jurisdiction over the Unfair Labor Practice claims.

The fourth cause of action in SEIU 925's Complaint is that release of the records at issue is a ULP under RCW 41.76.050(1)(a) and (b). CP 12. In the Complaint, SEIU 925 requests "[a]n order finding that UW committed an unfair labor practice by stating that it intends to release material in the document identified by it...and as a remedy publicize the order." CP 14. The trial court's Order Granting Motion for Summary Judgment and Permanent Injunction does not reach this issue, nor was this issue argued in SEIU 925's Motion. CP 315-35, 686-97.

After the permanent injunction order was entered on March 27, 2017, UW and SEIU 925 were under the impression that, if the trial, scheduled to begin April 24, was not changed or stayed, it would go forward, at least as to the ULP claims. CP 718-19, 823. On March 31, the trial court bailiff encouraged SEIU 925 to submit a motion on this issue. CP 825. Thus, SEIU 925 and UW – the parties with interests in the ULP allegations – filed a Joint Statement of Trial Readiness on April 3, per the Order Setting Case Schedule. Appendix E. SEIU 925 also filed a Motion to Change Trial Date and For Stay of Proceedings on April 3, requesting that the trial date be changed or stayed pending the outcome of this appeal. CP 719-22.

Even after review is accepted by the appellate court, "in a case involving multiple parties, claims, or counts, the trial court retains full authority to act in the portion of the case that is not being reviewed by the appellate court." RAP 7.2(l).[26] Parties risk "dismissal of claims without further notice" for failure to appear on a scheduled trial date. King County LCR 4(i)(1). Additionally, "failure to comply with the Case Schedule may be grounds for imposition of sanctions, including dismissal, or terms." King County LCR 4(g)(1). Finally, the purpose of CR 11 sanctions is "to deter *baseless* filings and to curb abuses of the judicial system." *See Bryant v. Joseph Tree,* 119 Wn.2d 210, 219, 829 P.2d 1099 (1991) (emphasis in original).

Here, the case involves multiple parties (the Foundation, SEIU 925, and UW), and SEIU 925's complaint includes multiple claims, including its fourth cause of action alleging ULPs, one of which involves UW's statement that it intended to release the documents at issue, not

[26] This rule references entry of judgments that may be appealed under RAP 2.2(d). An appeal from a final judgment in a case with multiple parties that does not dispose of all claims in the case is "subject only to discretionary review until the entry of a final judgment adjudicating all of the claims, counts, rights, and liabilities of all the parties." RAP 2.2(d). An appeal as a matter of right "may be taken from a final judgment that does not dispose of all of the claims as to all parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay." *Id.* SEIU 925 should not be disadvantaged for not seeking from the trial court an express finding, or not contesting this Court's treatment of the Foundation's Notice of Appeal as of right, in the interests of not burdening the judiciary with unnecessary motions.

merely that release of the documents is a ULP. One of the claims for relief requests an order so stating, and publication of such order. This ULP cause of action and remedy were not addressed in the trial court's permanent injunction order. The trial court thus had jurisdiction over SEIU 925's fourth cause of action, and it properly entered its Order Granting Petitioner's Motion to Change Trial Date/Stay Proceedings. Had SEIU 925 *not* filed such motion, it risked sanctions for not appearing at trial, particularly where UW planned to appear. Given that counsel for SEIU 925 conducted legal research, spoke with counsel for UW and the Foundation, and contacted the trial court judge's bailiff, all in connection with the filing of its motion [CP 821-25], and UW agreed the trial was still set, SEIU 925's motion is far from baseless. For these same reasons, the trial court appropriately issued an Order Denying Freedom Foundation's Combined Motion to Strike and Motion for Sanctions.

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V. CONCLUSION

For the foregoing reasons, SEIU 925 respectfully requests that this Court affirm the trial court's permanent injunction, preliminary injunction, and TRO enjoining release of the documents at issue. SEIU 925 also respectfully requests that this Court affirm the trial court's orders granting SEIU 925's Motion to Change Trial Date/Stay Proceedings, and denying the Foundation's Motion to Strike and For Sanctions.

RESPECTFULLY SUBMITTED this 26th day of July, 2017.

Kristen L. Kussmann, WSBA #30638
Jacob Metzger, WSBA #39211
Douglas Drachler McKee & Gilbrough LLP
1904 Third Ave, Suite 1030
Seattle, WA 98101-1170
(206) 623-0900
Fax: (206) 623-1432
kkussmann@qwestoffice.net
jmetzger@qwestoffice.net
Attorneys for Respondent SEIU 925

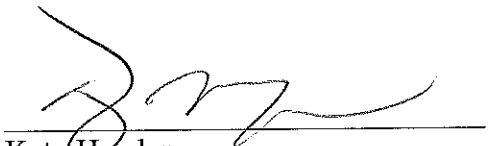
CERTIFICATE OF SERVICE

I, Katy Hayden, hereby declare under penalty of perjury under the laws of the State of Washington that on July 26, 2017, I am causing the foregoing to be filed with the Court of Appeals, Division I, and a true and correct copy of the same to be sent via email, to the following:

Robert Kosin
Nancy Garland
Office of the Assistant Attorney General
University of Washington
rkosin@uw.edu
nancysg@uw.edu

Stephanie Olson
David Dewhirst
James Abernathy
Greg Overstreet
Kirsten Nelsen
Freedom Foundation
solson@myfreedomfoundation.com
DDewhirst@myfreedomfoundation.com
jabernathy@myfreedomfoundation.com
goverstreet@myfreedomfoundation.com
KNelsen@freedomfoundation.com

SIGNED this 26th day of July, 2017, at Seattle, WA.



Katy Hayden

APPENDIX A

The Honorable Jeffrey Ramsdell

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925,

Plaintiff,

v.

THE UNIVERSITY OF WASHINGTON, et. al

Defendants.

No. 16-2-09719-7-SEA

PLAINTIFF/RESPONDENT'S DESIGNATION OF CLERK'S PAPERS FOR COURT OF APPEALS

TO THE CLERK OF THE COURT:

Please prepare and transmit to the Court of Appeals, Division I, the following clerk's papers:

SUB #	Document	Date Filed
31	Order on Assignment/Reassignment	5/26/2016
32	Declaration of Stephanie Olson	5/27/2016
78	Declaration of Kristen Kussmann	2/24/2017

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

106	Pre-Trial Report (Joint Confirmation)	4/3/2017

Dated this 26th day of July, 2017.

DOUGLAS DRACHLER MCKEE & GILBROUGH

Kristen Kussmann, WSBA #30638
1904 Third Ave., Ste. 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432
kkussmann@qwestoffice.net
pdrachler@qwestoffice.net
Attorneys for Plaintiff/Respondent SEIU Local 925

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

SERVICE EMPLOYEES UNION LOCAL 925,

Plaintiffs,

v.

UNIVERSITY OF WA; ET AL.,

Defendant.

No. 16-2-09719-7 SEA

ORDER OF REASSIGNMENT

(CLERK'S ACTION REQUIRED)

For the reason cited below:

__X__ Recusal of Judge

_____ Affidavit of Prejudice filed by a party to the action

_____ Judicial Unavailability

This matter is assigned from Judge Jim Rogers, Department 45, to Judge Jeffrey Ramsdell, Department 9. The moving party in any pending motion(s) must re-note the motion before the newly assigned judge.

DATED: 5/26/2016

Electronic signature attached

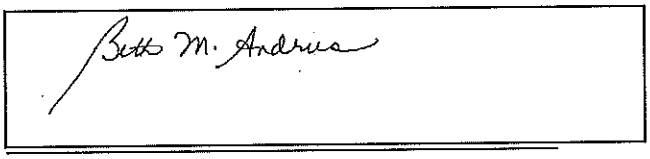
The Honorable Beth Andrus
Chief Civil Judge

King County Superior Court
516 3rd Avenue, Room C203
Seattle, Washington 98104
(206) 477-1537

King County Superior Court
Judicial Electronic Signature Page

Case Number:	16-2-09719-7
Case Title:	SERVICE EMPLOYEES INTL UNION LOCAL 925 VS UNIVERSITY OF WASHINGTON ET A
Document Title:	ORDER REASSIGNMENT

Signed by:	Beth Andrus
Date:	5/26/2016 3:02:03 PM



Judge/Commissioner: Beth Andrus

This document is signed in accordance with the provisions in GR 30.

Certificate Hash:	D92F76D12132FF531AF16720A721F097AC7A50B6
Certificate effective date:	7/29/2013 12:26:48 PM
Certificate expiry date:	7/29/2018 12:26:48 PM
Certificate Issued by:	C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA, O=KCDJA, CN="Beth Andrus:dE53Hnr44hGmww04YYhwmw=="

APPENDIX C

HON. JEFFREY M. RAMSDELL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, a labor union, Plaintiff, v. THE UNIVERSITY OF WASHINGTON, an agency of the State of Washington, and FREEDOM FOUNDATION, a non-profit organization, Defendants.	NO. 16-2-09719-7 SEA **DECLARATION OF STEPHANIE OLSON**

I, Stephanie Olson, hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. I am over the age of 18, have personal knowledge of the facts set forth herein, and am competent to testify.

2. I am representative counsel to the Freedom Foundation in the above-captioned matter and am fully authorized to act on its behalf throughout this litigation.

3. The University of Washington received a request from the Freedom Foundation dated December 29, 2015, which is the subject of King County Case No. 16-2-09719-7 (referred to

herein as "instant request"). Defendant Freedom Foundation believes the issues raised by Plaintiff, though meritless, should be argued and decided before a judge who has been fully briefed on the issues of the instant action—not on a TRO ex parte calendar with less than 24 hours' notice to the parties and with no opportunity for substantive counter-argument. Accordingly, Defendant Freedom Foundation wishes to push the instant public records disclosure dates back to **Friday, June 10, 2016 (absent the circumstance where a preliminary injunction hearing *occurs* in the interim)**. To that effect, Defendant Freedom Foundation waives any claims of liability against the above-named State Defendant it may otherwise pursue under the Public Records Act, RCW 42.56, until **4:00 PM on Friday, June 10, 2016 (absent the circumstance where a preliminary injunction hearing *occurs* in the interim)**. The Foundation's intent with this waiver is to allow the above-named State Defendant to delay disclosure until 4:00 PM on Friday, June 10, 2016, without incurring any risk of liability under the Public Records Act. This will allow for the setting of a date for the hearing on SEIU 925's motion for a preliminary injunction, and for the parties to enter into a subsequent agreement if necessary. *University of Washington* will not release the records prior to **4pm on June 10, 2016 (absent the circumstance where a preliminary injunction hearing *occurs* in the interim). SEIU 925 will not pursue a TRO motion before June 9, 2016.**

Dated this 27th day of May, 2016 at Olympia, WA.

Stephanie D. Olson, WSBA # 50100
c/o Freedom Foundation
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482
f. 360.352.1874
solson@myfreedomfoundation.com

APPENDIX D

The Honorable Jeffrey Ramsdell
Noted for Hearing on March 24, 2017 at 2pm
With Oral Argument

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, Petitioner, vs. THE UNIVERSITY OF WASHINGTON, et. al Respondents.	No. 16-2-09719-7 SEA **DECLARATION OF KRISTEN KUSSMANN IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION**

I, Kristen Kussmann, declare as follows:

1. I am over the age of 18 and am competent to be a witness in this matter. I am one of the counsel of record in the above-captioned case, representing SEIU Local 925.

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

2. Attached as Exhibit A is a true and correct copy of an email dated December 29, 2015 from Maxford Nelson of the Freedom Foundation to what appears to be a University of Washington email address (pubrec@uw.edu).

3. Attached as Exhibit B is a true and correct copy of the Declaration of Michael Laslett in Support of Petitioner's Motion for Temporary Restraining Order, dated April 24, 2016 and previously filed in the above-captioned case.

4. Attached as Exhibit C is a true and correct copy of the Declaration of Professor Robert Wood in Support of Petitioner's Motion for Preliminary Injunction (with attached exhibits), dated May 16, 2016, and previously filed in the above-captioned case.

5. Attached as Exhibit D is a true and correct copy of the Declaration of Jacob Metzger in Support of Petitioner's Motion for Preliminary Injunction, dated July 6, 2016 and previously filed in the above-captioned case.

6. Attached as Exhibit E is a true and correct copy of the Declaration of William Dale in Support of Petitioner's Motion for Preliminary Injunction, dated July 28, 2016 and previously filed in the above-captioned case.

7. Attached as Exhibit F is a true and correct copy of the Declaration of Keenan Layton in Support of Petitioner's Motion for Preliminary Injunction, dated July 28, 2016 and previously filed in the above-captioned case.

8. Attached as Exhibit G is a true and correct copy of the Declaration of Brooke Lather in Support of Petitioner's Motion for Preliminary Injunction, dated July 28, 2016 and previously filed in the above-captioned case.

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

9. Attached as Exhibit H is a true and correct copy of the (Second) Declaration of Jacob Metzger in Support of Petitioner's Motion for Preliminary Injunction, dated July 28, 2016 and previously filed in the above-captioned case.

10. Attached as Exhibit I is a true and correct copy of the Third Declaration of Jacob Metzger in Support of Petitioner's Motion for Preliminary Injunction, dated August 12, 2016 and previously filed in the above-captioned case.

11. Attached as Exhibit J is a true and correct copy of the Fourth Declaration of Jacob Metzger in Support of Petitioner's Motion for Preliminary Injunction, dated September 11, 2016 and previously filed in the above-captioned case.

12. Attached as Exhibit K is a true and correct copy of *Howell Educ. Ass'n v. Howell Bd. of Educ.*, 287 Mich.App 228, 789 N.W.2d 495 (2010), retrieved from lexis advance.

13. Attached as Exhibit L is a true and correct copy of *Gallant v. NLRB,* 26 F.3d 168 (D.C. Cir. 1994), retrieved from lexis advance.

14. The following pages of the document, identified by UW as "PR-2015-00810 Stage 1 Release_paginated.pdf," include current and former membership lists of the University of Washington Chapter of the American Association of University Professors ("AAUP"): 000737-000793. Some of these pages also contain what appear to be personal email addresses as well as residential addresses.

15. Attached as Exhibit M is a true and correct copy of an email dated July 6, 2016 from Robert Kosin, Assistant Attorney General, UW Division, documenting the release of 102 pages of public records contained in "PR-2015-00810 Stage 1 Release_paginated.pdf" by the

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

UW Office of Public Records to the Freedom Foundation, along with the 102 pages of public records attached to the email.

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

SIGNED this 24th day of February, 2017.

Kristen Kussmann

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

EXHIBIT A
TO KUSSMANN DEC.

pubrec

From: Maxford Nelsen <MNelsen@myfreedomfoundation.com>
Sent: Tuesday, December 29, 2015 2:55 PM
To: pubrec@uw.edu
Subject: Request for public records

UW Staff,

In accordance with RCW 42.56, I would like to submit a request for public records on behalf of the Freedom Foundation. Specifically, I am seeking:

1. All documents, emails or other records created by, received by, or in the possession of University of Washington faculty/employees Amy Hagopian, Robert Wood, James Liner, or Aaron Katz that contain any of the following terms:
    a. Freedom Foundation (aka., "FF," "EFF," and "The Foundation")
    b. Northwest Accountability Project
    c. Right-to-work (aka., "right to work," "RTW,", and "R2W")
    d. Friedrichs v. California Teachers Association (aka., "Friedrichs v. CTA" and "Friedrichs")
    e. SEIU
    f. Union
2. All emails sent by University of Washington faculty/employees Amy Hagopian, Robert Wood, James Liner, or Aaron Katz to any email address ending in "@seiu925.org" or "@uwfacultyforward.org"
3. All emails received by University of Washington faculty/employees Amy Hagopian, Robert Wood, James Liner, or Aaron Katz from any email address ending in "@seiu925.org" or "@uwfacultyforward.org"
4. All emails sent from and received by the following email address: aaup@u.washington.edu

For the purposes of this request, I am only interested in records from January 1, 2014 to the present.

It is my preference to receive any responsive documents in an electronic format with all original meta data intact.

Please feel free to let me know if you have any questions or would like me to clarify the nature of my request.

Best,

Maxford Nelsen
Labor Policy Analyst | Freedom Foundation
MNelsen@myFreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation.com

EXHIBIT B
TO KUSSMANN DEC.

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, a labor union Petitioners, vs. THE UNIVERSITY OF WASHINGTON, an agency of the State of Washington, and FREEDOM FOUNDATION, an organization Respondents.	No. **DECLARATION OF MICHAEL LASLETT IN SUPPORT OF PETITIONER'S MOTION FOR TEMPORARY RESTRAINING ORDER**

Michael Laslett declares as follows:

1. I am over the age of 18, am competent to be a witness in this matter, and make the following declaration based upon my personal knowledge.

2. I am the Organizing Director at the Service Employees International Union ("SEIU 925"). I have held that position since March 2012. I worked at SEIU 925 from 2001-2007 and then returned to SEIU 925 in March 2012.

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

3. SEIU 925 is a labor organization representing public and private sector workers in Washington State. SEIU 925 represents employees of the University of Washington in a number of bargaining units. Some of the purposes of SEIU 925 include organizing faculty at institutions of higher education in Washington State and providing representation as appropriate to our members and individuals SEIU 925 represents.

4. SEIU 925 has offices throughout the state and is headquartered in King County.

5. As Organizing Director, I have been involved in the work of SEIU 925 with faculty at the University of Washington ("UW") to organize a union under the Washington State statute that provides collective bargaining for faculty at public four-year institutions of higher education, RCW Chapter 41.76. In that capacity, I have communicated with UW faculty regarding union organizing.

6. UW Professor Robert Wood is a member of SEIU 925.

7. I understand that the Freedom Foundation submitted a request for public records to UW on December 29, 2015. I understand that this request seeks documents that pertain to and name SEIU 925, Professor Wood, and other UW faculty members.

8. I understand that on approximately Monday, April 18, 2016, Professor Wood picked up a CD containing the documents UW intends to release. I understand that the CD contains a PDF file entitled "PR-2015-00810 Stage 1 Release_paginated.pdf". I have not reviewed the entire document – containing 3,913 pages of material – to date. However, I have identified certain types of emails in the material, including emails regarding union organizing between myself and faculty at UW and emails regarding union organizing between other staff at

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

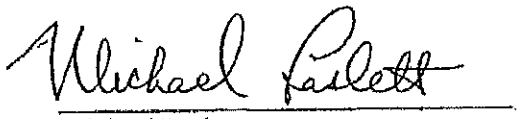
SEIU 925 and UW faculty. Some of this material includes emails sent to and received by faculty members at their non-UW email addresses. The document also contains emails from the UW chapter of the American Association of University Professors email listserver and personal and private emails between Professor Wood and other individuals, some of which name and/or pertain to SEIU 925. These emails do not relate to the conduct and functioning of government.

9. Release of these emails would significantly harm SEIU 925 and our member Professor Wood. Release would chill union organizing efforts, including the participation of SEIU 925 members and faculty in such efforts. Emails SEIU 925 staff send to faculty members regarding personal and private matters – including union organizing – are not intended for public release.

10. In addition, release of these emails would interfere with the rights of faculty at UW regarding the selection of a collective bargaining representative of their choosing, such as the right to communicate with each other about unionization. Release of these emails would be highly offensive to SEIU 925.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED this 24th day of April, 2016.



Michael Laslett

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

EXHIBIT C
TO KUSSMANN DEC.

The Honorable Jim Rogers
Noted for Hearing on May 27, 2016 at 10:30 am
Oral Argument Requested

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, a labor union

Petitioner,

vs.

THE UNIVERSITY OF WASHINGTON, an agency of the State of Washington, and FREEDOM FOUNDATION, an organization

Respondents.

No. 16-2-09719-7 SEA

DECLARATION OF PROFESSOR ROBERT WOOD IN SUPPORT OF PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION

I, Professor Robert Wood, declare as follows:

1. I am over the age of 18 and am competent to be a witness in this matter.

2. I am a tenured Professor at the University of Washington ("UW") in the Department of Atmospheric Sciences. I have been employed in the UW's Department of Atmospheric Sciences with various professor titles since 2004. Prior to that I served as a

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

Research Associate in the same department from 2001-2003. Attached as Exhibit A is a copy of my curriculum vitae, last updated in late 2014 or early 2015.

3. I reside in King County, Washington.

4. I am a member of the Service Employees International Union Local 925 ("SEIU 925"). I have communicated on numerous occasions with SEIU 925 about organizing UW faculty for the purposes of collective bargaining under Chapter 41.76 of the RCW.

5. I am the current president of the UW chapter of the American Association of University Professors ("AAUP"). I have served as president of the UW AAUP chapter since 2012. The UW AAUP chapter is chartered as a chapter by the national AAUP. The national AAUP is a non-profit professional organization organized and operated under Section 501(c)(6) of the Internal Revenue Code. The UW AAUP chapter has its own bylaws and is a private not-for-profit organized and operated pursuant to Section 501(c)(6) of the Internal Revenue Code The UW chapter of AAUP has existed since 1918.

6. The UW AAUP chapter operates an email "listserver" entitled "Faculty Issues and Concerns." The UW AAUP listserver uses the UW email account, "aaup@u.washington.edu." Participation in the UW AAUP listserver is not limited to UW AAUP members, or even to employees and students of UW. Participation in the listserver must be approved.

7. The mission of the UW chapter of AAUP is "to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security and working conditions of all categories of faculty,

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to develop the standards and procedures that maintain quality in education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good."

8. My activities as a member of SEIU 925, including communications with SEIU 925 and others regarding union organizing, are not part of my job duties and responsibilities as a Professor at UW.

9. Similarly, my activities as a member of and president of the UW chapter of AAUP are not part of my job duties and responsibilities as a Professor at UW.

10. Attached as Exhibit B is a copy of a web site job posting for a UW Department of Atmospheric Sciences Assistant, Associate, or Associate Professor, Tenure Track. This job posting is somewhat representative of the duties and responsibilities of a professor in the Department of Atmospheric Sciences. It broadly describes the type of work I perform as a Professor at UW.

11. As a UW employee, I have several UW email accounts. I use these for matters related to my employment at the UW and also to send and receive personal emails and private emails. My understanding is that UW does not prohibit personal use of UW email accounts. I also have a private, non-UW email address, which I use to send and receive personal and private emails.

12. I was contacted by the UW Office of Public Records and Open Public Meetings regarding an email dated December 29, 2015 to UW from the Freedom Foundation, and was

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

provided a copy of the email. Employees of the Office of Public Records asked me to search my records for documents responsive to the request.

13. I conducted electronic searches of my email accounts using the terms in the FF request. These searches returned a large number of emails, including emails sent from and received at my UW email accounts, as well as emails sent from and received at my private, non-UW email address. I provided emails that resulted from my electronic searches to Parry Tapper, Compliance Officer, University of Washington Office of Public Records and Open Public Meetings. I did not further filter or review each of the emails individually before providing them to Tapper due to the large volume of material produced by the searches.

14. Tapper sent me an email dated April 12, 2016 indicating that UW would release records on April 27, 2016, absent a court order stopping the release of records. Attached as Exhibit C is a true and correct copy of this email. (The text of an email I sent forwarding Tapper's email is redacted from the first page.) Tapper's email did not include the documents UW intends to release as an attachment, link, or in the email text. I emailed Tapper to request a copy of the documents UW intends to release.

15. On Monday, April 18, 2016, I picked up a CD from the UW Office of Public Records and Open Public Meetings. This CD contains the documents UW stated it intends to release, specifically a 3,913-page PDF file entitled "PR-2015-00810 Stage 1 Release_paginated.pdf".

16. I have closely reviewed pages 000001-001347 of "PR-2015-00810 Stage 1 Release_paginated.pdf". I did not closely review additional pages due to time restrictions and

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

given that SEIU 925 staff were engaged in review of those pages. In reviewing pages 000001-001347 of "PR-2015-00810 Stage 1 Release_paginated.pdf", I placed emails into the following categories:

1) Emails that clearly relate to UW business

2) Emails that are about union organizing

3) Emails that are postings to the AAUP UW chapter listserver, including private emails off the listserver regarding postings

4) Emails between myself and others that relate to non-UW business

5) Emails containing lists of individuals and possibly their personal contact information

6) Emails that mention SEIU 925 specifically

8) Emails containing drafts of reports or other documents.

Some of the emails fall within more than one of the above categories. I created a spreadsheet summarizing my review of pages 000001-001347 of "PR-2015-00810 Stage 1 Release_paginated.pdf", which is attached as Exhibit D. Column A of this spreadsheet reflects the page number of "PR-2015-00810 Stage 1 Release_paginated.pdf", with zeros removed from the beginning of the page number. Columns B-D contain numbers that correspond with the categories in numbers 1)-6) and 8) above.

17. The following pages in pages 000001-001347 of "PR-2015-00810 Stage 1 Release_paginated.pdf" contain documents that appear to be related to UW business: 000007-000013, 000015-000017, 000020-000022, and possibly 000139-000140. These include emails

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

regarding adding a student to a class and emails regarding a Department of Atmospheric Sciences workshop.

18. I tried my best to correctly identify emails. However, it is possible that some of the emails are incorrectly categorized, and that I made mistakes regarding page numbers, given the volume of pages that I reviewed

19. With respect to the additional pages that I have not closely reviewed, I can tell that they contain emails that were sent from or received by me at my private, non-UW email address. Some of the emails in the additional pages relate to union organizing. Some of the emails in the additional pages are postings on the AAUP UW chapter listserver. Some of the emails in the additional pages are personal and private communications between myself and other individuals. Many of the emails in the additional pages name me and/or pertain to me. Some emails contain unredacted my and other individuals' personal email addresses. The additional pages contain lists of individuals, including both members of the public and faculty members. Some of the additional pages contain emails sent to a private email group that I signed up for using my private, non-UW email account. Emails regarding this group were received by me at my non-UW private email address.

20. On April 26, 2016, I received another email from Tapper, indicating that the release date for the records was being postponed until 5pm on May 27, 2016, pending court action on the same date. Attached as Exhibit E is a true and correct copy of this email.

21. I would be harmed if the information in the materials were to be released, and release of the materials would be highly offensive. The union organizing of faculty at the UW

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

continues. If other faculty members – including myself – knew that information about such organizing efforts could be made public, this would deter participation, which would adversely impact faculty's ability to make decisions about a union. If faculty knew that emails from the email listserver of a private organization – the UW chapter of AAUP – could be publicly released, this would hamper and chill discussion on the listserver. Similarly, I would be harmed by having my personal and private emails with other individuals, including faculty members, regarding subjects unrelated to the functioning of government released.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED this 16th day of May, 2016.

Professor Robert Wood

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

EXHIBIT A

CURRICULUM VITAE - Robert Wood

Professor
Atmospheric Sciences, Box 351640, University of Washington, Seattle, WA 98195
Email: robwood@atmos.washington.edu
Web: www.atmos.washington.edu/~robwood
Tel: (206)-543-1203; *Fax:* (206)-685-9302

Education:

B.A. University of Cambridge, UK, 1989-1992
Natural Sciences (Physics and Theoretical Physics)

Ph.D. University of Manchester Institute of Science and Technology, UK, 1993-1997
Atmospheric Physics, Title: *Aircraft Observations of Boundary Layer Structure,* Advisor Peter R Jonas

Professional Experience

Department of Atmospheric Sciences, University of Washington, Seattle (2014-present):
Professor: Responsible for the development of a program of research centered on the understanding of cloud physical processes, and teaching in the undergraduate and graduate program.

Department of Atmospheric Sciences, University of Washington, Seattle (2010-present):
Associate Professor: Responsible for the development of a program of research centered on the understanding of cloud physical processes, and teaching in the undergraduate and graduate program.

Department of Atmospheric Sciences, University of Washington, Seattle (2006-2010):
Assistant Professor: Responsible for the development of a program of research centered on the understanding of cloud physical processes, and teaching in the undergraduate and graduate program.

Department of Atmospheric Sciences, University of Washington, Seattle (2004-2006):
Research Assistant Professor: Responsible for the development of a program of research centered on the understanding of cloud physical processes.

Department of Atmospheric Sciences, University of Washington, Seattle (2001-2003):
Research Associate: Studied boundary layer cloud structure, variability, and microphysical processes.

Meteorological Research Flight, UK Met Office (1997-2001):
Research Scientist: Research related to boundary layer cloud microphysical processes and structural properties. Responsibilities included the planning and executing of aircraft-based field programs.

Honors

- The 2001 L. F. Richardson Prize, Royal Meteorological Society.
- Editors' Citation for Excellence in Refereeing for *Journal of Geophysical Research – Atmospheres,* 2007.
- University of Washington Department of Atmospheric Sciences Teaching Award
- The 2011 Henry G Houghton Award, American Meteorological Society, "*For advancing understanding of the interactions between cloud droplets, aerosols, radiation and precipitation in marine stratocumulus.*"

Professional Activities

- Editor, Journal of Climate (2009-present)
- Reviewer for Journal of the Atmospheric Sciences, Quarterly Journal of the Royal Meteorological Society, Journal of Climate, Journal of Geophysical Research, Atmospheric Research, Atmospheric Chemistry and Physics, Journal of Applied Meteorology, Journal of Atmospheric and Oceanic

Technology, Atmospheric Chemistry and Physics, Transactions on Geoscience and Remote Sensing, Journal of Computational Physics, Geophysical Remote Sensing Letters, Nature.

- Member of American Meteorological Society, Royal Meteorological Society, American Geophysical Union
- American Meteorological Society STAC Atmospheric Radiation committee member
- VAMOS Ocean-Cloud-Atmosphere-Land Study (VOCALS) Scientific Working Group member
- Principal Investigator - VOCALS-Regional Experiment (VOCALS-REx), Chile, Oct/Nov 2008.
- Principal Investigator – ARM Mobile Facility Deployment - Clouds, Aerosols and Precipitation (CAP-MBL), Azores (March-December 2009)
- International CLIVAR Variability of the American Monsoon Systems (VAMOS) Panel Member, 2012-2013
- iLeaps/IGAC Aerosols, Clouds, Precipitation and Climate (ACPC) Initiative working group member, 2011-present
- Member, International Commission on Clouds and Precipitation (ICCP), 2012-present.
- Chairperson, Gordon Conference on Radiation and Climate, 2011.
- NASA CloudSat/CALIPSO Mission Science Team Member.
- Physics of Stratocumulus Top (POST) Science Team Member.
- Member, Cloud-Aerosol-Precipitation Interactions (CAPI) Working Group of the DoE Atmospheric Systems Research (ASR) Program, Nov 2009-present.
- Chair, Cloud-Aerosol-Precipitation Interactions (CAPI) Working Group of the DoE Atmospheric Systems Research (ASR) Program, Aug 2013-present.
- Member, Science and Infrastructure Steering Committee of the DoE Atmospheric Systems Research (ASR) Program, Aug 2013-present.
- Member, ARM Science Board, April 2014-present.
- US Climate Variability and Predictability Research Program (CLIVAR) Scientific Steering Committee, Member, 2011-present
- Member, US CLIVAR Process Study Model Improvement Panel (PSMIP), 2010-2013.
- CoChair, US CLIVAR Process Study Model Improvement Panel (PSMIP), 2011-2013.
- Study Co-lead, Keck Institute for Space Studies (KISS): Innovative Satellite Observations to Characterize the Cloudy Boundary Layer, 2010-present.

Peer-reviewed Publications

[H-index 32 from 90 publications, 2636 citations with mean of 29.0 citations per paper]

[1] Wood, R., I. M. Stromberg, P. R. Jonas and C. S. Mill, 1997: Analysis of an air motion system on a light aircraft for boundary layer research. *J. Atmos. Oceanic Technol.*, **14**, 960-968.

[2] Wood, R., D. W. Johnson and S. R. Osborne, 1998: The effect of drizzle on the redistribution of aerosol in the boundary layer: estimation of the scale of the effect during ACE-2 using aircraft data. *J. Aerosol Sci.*, **29**, Supp 1, 1097-1098.

[3] Wood, R., I. M. Stromberg and P. R. Jonas, 1999: Aircraft observations of sea breeze frontal structure. *Quart. J. Roy. Meteor. Soc.*, **125**, 1959-1996.

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[5] Wood, R., D. W. Johnson, S. R. Osborne, M.O. Andreae, B. Bandy, T. S. Bates, C. O'Dowd, P. Glantz, K. Noone, P. K. Quinn, J. Rudolph, K. Suhre, 2000: Boundary layer and aerosol evolution during the third Lagrangian experiment of ACE-2. *Tellus*, **52B**, 401-422.

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[7] Johnson D. W., S. R. Osborne, R. Wood, B. Bandy, M. O. Andreae, C. O'Dowd, P. Glantz, K. Noone, J. Rudolph, T. S. Bates P. K. Quinn, 2000: Observations of the evolution of the aerosol, cloud and boundary layer characteristics during the first Lagrangian experiment of ACE-2. *Tellus*, **52B**, 348-374.

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[12] Wood. R, 2000: Parametrization of the effect of drizzle upon the droplet effective radius in stratocumulus clouds. *Quart. J. Roy. Meteorol. Soc.*, **126**, 3309-3325.

[13] Suhre, K., D. W. Johnson, R. Rosset, S. R. Osborne, R. Wood, T. S. Bates, F. Raes, 2000: A continental outbreak of air that occurred during the Second Aerosol Characterization Experiment (ACE 2): A Lagrangian experiment. *J. Geophys. Res.*, **105**, 17911-17924.

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[16] Larson, V. E., R. Wood, P. R. Field, J.-C. Golaz, T. H. Vonder Haar, W. R. Cotton, 2001: Systematic biases in the microphysics and thermodynamics of numerical models that ignore subgrid-scale variability. *J. Atmos. Sci.*, **58**, 1117-1128.

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[53] Wood, R., T. Kubar, and D. L. Hartmann. Understanding the importance of microphysics and macrophysics for warm rain in marine low clouds: Part II. Heuristic models of rain formation. *J.Atmos. Sci.*, **66**, 2973-2990.

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EXHIBIT B

Academic HF Academic Job: College of the Environment

Atmospheric Sciences – Assistant, Associate, or Associate Professor Tenure Track (AA15406)

Position Overview

Organization: College of the Environment, Atmospheric Sciences

Title : Assistant Professor, Associate Professor, Associate Professor, Tenure Track

Search Number : AA15406

Position Details

The University of Washington (UW) seeks to expand its current expertise in regional climate modeling, with an emphasis on processes studies related to climate variability and climate change. In pursuit of this goal, the Department of Atmospheric Sciences invites applications for a full-time, 9-month (100% FTE), multi-year faculty position that may be filled as Assistant Professor (0116) or Associate Professor (0102), or as Associate Professor Tenure Track (0109) to begin Autumn 2016.

We anticipate the successful candidate's research will focus on earth system processes on a regional scale that advances our understanding of climate variability and climate change. The method of study should include traditional and novel methods for analyses of modeling, observations and theory. Examples of areas of emphasis could include, but are not limited to land-atmosphere interaction, including drought, extreme events, and impacts on agriculture; seasonal to interannual climate predictability, including impacts on terrestrial and marine ecosystems; and climate-ecology interaction, including fire and its implications. All regions are potentially of interest, including the western US. The appointment will be in the Department of Atmospheric Sciences and the candidate will be expected to help shape and take a leading role in the emerging Regional Climate Center at the University of Washington.

The Department of Atmospheric Sciences resides in the College of the Environment, which fosters collaborations between the faculty, staff, and students engaged in the study of environmental sciences, engineering, and

the human dimensions of environmental challenges. This position will offer opportunities for interaction with researchers in a wide range of disciplines, including ecology, biology, geology, oceanography, hydrology, economics, and environmental policy. All UW faculty engage in teaching, research, and service. A willingness to work collaboratively with faculty and to mentor students from a wide range of disciplines, cultures, economic means, and academic backgrounds is essential.

The UW is located in the greater Seattle metropolitan area, with a dynamic, multicultural community of 3.7 million people and a range of ecosystems from mountains to ocean. The UW serves a diverse population of 80,000 students, faculty and staff, including 25% first-generation college students, over 25% Pell Grant students, and faculty from over 70 countries. A recipient of the 2006 Alfred P. Sloan Award for Faculty Career Flexibility and a National Science Foundation ADVANCE Institutional Transformation Award to increase the advancement of women faculty in science, engineering, and math (see www.engr.washington.edu/advance), the UW provides a wide range of networking, mentoring and development opportunities for faculty.

A Ph.D. or foreign equivalent in Atmospheric Sciences or related field and a record of climate research are required. Applicants should supply a curriculum vitae, a 3-5 page statement of experience and interest in research teaching and outreach, particularly to under-served communities; and submit at least three letters of reference to: Professor David Battisti, Search Committee Chair, Department of Atmospheric Sciences, University of Washington, Box 351640, Seattle, WA 98195-1640. Please send electronic submissions to Debbie Wolf at debbie@atmos.washington.edu. Individuals with disabilities desiring accommodations in the application process should notify Debbie Wolf at debbie@atmos.washington.edu, 206-543-4251. Send queries about the position to Prof. David Battisti at battisti@washington.edu.

Consideration of applications will begin immediately and continue until the position is filled. Priority will be given to applications received before January 15, 2016. The proposed starting date of employment is September 16, 2016. University of Washington is an affirmative action and equal opportunity employer. All qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, protected veteran or disabled status, or genetic information.

Thank you for your interest in this position at the University of Washington.

EXHIBIT C

-------- Forwarded Message --------
Subject:public records request PR-2015-00810
Date: Tue, 12 Apr 2016 14:16:43 -0700
From:pubrec <pubrec@uw.edu>
To:ROBERT WOOD <robwood2@uw.edu>

April 12, 2016

To: Professor Robert Wood
Re: public records request PR-2015-00810

The University of Washington received the attached request for records under the State of Washington Public Records Act. Pursuant to RCW 42.56.540, we are providing this notice to you as a person to whom at least some of these responsive records pertain.

The University intends to release records, those emails you provided from your email account, on April 27, 2016. Under the Public Records Statute, individuals may seek a court order to enjoin the University from releasing certain records.

If you intend to seek a court order, you have until April 26, 2016 to do so and to provide this office with a copy of the order. If you are represented by legal counsel in this matter, your attorney may contact the University's lawyer, Rob Kosin, at 206.543.4150.

Sincerely,

Perry Tapper
Compliance Officer

UNIVERSITY OF WASHINGTON
Office of Public Records and Open Public Meetings
Mail: Roosevelt Commons-Box 354997, Seattle, WA 98195
Street: 4311 11th Ave NE, #360
206.543.9180 fax 206.616.6294
pubrec@uw.edu http://depts.washington.edu/pubrec/

EXHIBIT D

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1243	1242	4	2	6

	A	B	C	D
1244	1243	4	2	6
1245	1244	4	2	6
1246	1245	4	2	6
1247	1246	4	2	6
1248	1247	4	2	6
1249	1248	4	2	6
1250	1249	4	2	6
1251	1250	4	2	6
1252	1251	4	2	6
1253	1252	4	2	6
1254	1253	4	2	6
1255	1254	4	2	6
1256	1255	4	2	6
1257	1256	4	2	6
1258	1257	4	2	6
1259	1258	4	2	6
1260	1259	4	2	6
1261	1260	4	2	6
1262	1261	4	2	6
1263	1262	4	2	6
1264	1263	4	2	6
1265	1264	4	2	6
1266	1265	4	2	6
1267	1266	4	2	6
1268	1267	4	2	6
1269	1268	4	2	6
1270	1269	4	2	6
1271	1270	4	2	6
1272	1271	4	2	6
1273	1272	4	2	6
1274	1273	4	2	6
1275	1274	4	2	6
1276	1275	4	2	6
1277	1276	4	2	6
1278	1277	4	2	6
1279	1278	4	2	6
1280	1279	4	2	6
1281	1280	4	2	6
1282	1281	4	2	6
1283	1282	4	2	6
1284	1283	4	2	6
1285	1284	4	2	6
1286	1285	4	2	6
1287	1286	4	2	6
1288	1287	4	2	6
1289	1288	4	2	6

	A	B	C	D
1290	1289	4	2	6
1291	1290	4	2	6
1292	1291	4	2	6
1293	1292	4	2	6
1294	1293	4	2	6
1295	1294	4	2	6
1296	1295	4	2	6
1297	1296	4	2	6
1298	1297	4	2	6
1299	1298	4	2	6
1300	1299	4	2	6
1301	1300	4	2	6
1302	1301	4	2	6
1303	1302	4	2	6
1304	1303	4	2	6
1305	1304	4	2	6
1306	1305	4	2	6
1307	1306	4	2	6
1308	1307	4	2	6
1309	1308	4	2	6
1310	1309	4	2	6
1311	1310	4	2	6
1312	1311	4	2	6
1313	1312	4	2	6
1314	1313	4	2	6
1315	1314	4	2	6
1316	1315	4	2	6
1317	1316	4	2	6
1318	1317	4	2	6
1319	1318	4	2	6
1320	1319	4	2	6
1321	1320	4	2	6
1322	1321	4	2	6
1323	1322	4	2	6
1324	1323	4	2	6
1325	1324	4	2	6
1326	1325	4	2	6
1327	1326	4	2	6
1328	1327	4	2	6
1329	1328	4	2	6
1330	1329	4	2	6
1331	1330	4	2	6
1332	1331	4	2	6
1333	1332	4	2	6
1334	1333	4	2	6
1335	1334	4	2	6

EXHIBIT E

On Apr 26, 2016, at 4:38 PM, Public Records <pubrec@uw.edu> wrote:

To: Professor Robert Wood
Re: public records request PR-2015-00810

Dear Professor Wood:

I write to advise you that the release date for the records you provided to the Office of Public Records and Open Public Meetings, which the University proposed for April 27, 2016, is being postponed pending a court action until May 27, 2016. Accordingly, the University will not release records pertaining to your request to the requestor, Freedom Foundation, pending the court's decision before 5:00 p.m. Friday, May 27, 2016.

A hearing has been set for Friday, May 27, 2016, at 1:30 p.m.at the King County Courthouse, 516 Third Avenue, Room E-733, Seattle, Washington. Please consult the King County Superior Court to confirm dates, times and room assignments for this and all future hearings.

Sincerely,

PERRY M. TAPPER
Compliance Officer
Office of Public Records and Open Public Meetings
Roosevelt Commons Box 354997
4311 11th Ave NE, #360, Seattle, WA 98195
206.543.9180 / fax 206.616.6294
pubrec@uw.edu / http://depts.washington.edu/pubrec/

EXHIBIT D
TO KUSSMANN DEC.

The Honorable Jeffrey Ramsdell
Noted for Hearing on August 5, 2016 at 9:00 am
Oral Argument Requested

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, a labor union Petitioners, vs. THE UNIVERSITY OF WASHINGTON, an agency of the State of Washington, and FREEDOM FOUNDATION, an organization Respondents.	No. 16-2-09719-7 SEA **DECLARATION OF JACOB METZGER IN SUPPORT OF PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION**

I, Jacob Metzger, declare as follows:

1. I am over the age of 18 and am competent to be a witness in this matter.

2. On June 10, 2016, this Court entered a temporary restraining order "with respect to all records through the next hearing and/or further order of the court except that records identified as 'public records' shall be released by July 6, 2016 at 5:00PM and that SEIU shall on or before July 6, 2016 5:00PM set a hearing before the court to show by affidavit cataloging and

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Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

describing with sufficient particularity as to the status of the records as public or not public records." Such cataloging will be provided prior to the preliminary injunction hearing (pursuant to deadlines set forth in local and civil rules), set for August 5, 2016 at 9AM.

3. On July 6, 2016 at 3:29 PM I sent by electronic mail a 102-page document titled "Public Records 7.6.16" to the University of Washington, via Rob Kosin and Nancy Garland, pursuant to the Court's June 10, 2016 order. "Public Records 7.6.16" contains those documents identified as public records by Service Employees International Union, Local 925, pursuant to the court's June 10, 2016 order.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED this 6th day of July, 2016.

Jacob Metzger
WSBA No. 39211

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Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

EXHIBIT E
TO KUSSMANN DEC.

The Honorable Jeffrey Ramsdell
Noted for Hearing on August 5, 2016 at 9:00 am
Oral Argument Requested

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, a labor union Petitioners, vs. THE UNIVERSITY OF WASHINGTON, an agency of the State of Washington, and FREEDOM FOUNDATION, an organization Respondents.	No. 16-2-09719-7 SEA **DECLARATION OF WILLIAM DALE IN SUPPORT OF PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION**

William Dale declares as follows:

1. I am over the age of 18, am competent to be a witness in this matter, and make the following declaration based upon my personal knowledge.

2. I am Organizer at the Service Employees International Union ("SEIU 925").

3. Between approximately June 29, 2016 and July 5, 2016, I reviewed pages 00628-00805 and pages 01024-01346 of a document, entitled "PR-2015-00810 Stage 1 Release_paginated.pdf." I sorted the pages reviewed into the following categories:

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Fax: (206) 623-1432

(1) Emails and documents relating to UW business (public records).

(2) Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925.

(3) Postings to the AAUP UW Chapter listserver.

(4) Personal emails and/or documents unrelated to any UW business.

(5) Personal emails sent or received by Professor Rob Wood in his capacity as AAUP UW Chapter President and unrelated to UW business.

(6) Emails containing lists of individuals.

Many of the documents fall within more than one of the above categories.

4. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 2** (Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925):

- 00635-00637
- 00642-00647
- 00695-00798
- 01027-01096
- 01098-01099
- 01105-01105
- 01109-01116
- 01119-01119
- 01134-01201
- 01206-01266
- 01272-01346

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Phone: (206) 623-0900
Fax: (206) 623-1432

5. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 3** (postings to the AAUP UW Chapter listserver):

- 01153-01165
- 01190-01201
- 01206-01215
- 01220-01244
- 01255-01266
- 01272-01283
- 01292-01304
- 01308-01343

6. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 5** (Personal emails sent or received by Professor Rob Wood in his capacity as AAUP UW Chapter President and unrelated to UW business):

- 01153-01165
- 01190-01201
- 01206-01215
- 01220-01244
- 01255-01266
- 01272-01286
- 01292-01346

7. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 6** (Emails containing lists of individuals):

- 00736-00794

8. Many of the documents reviewed are duplicitous because they are part of an email chain and it appears that each time a new email is attached to the chain, the entire chain is reproduced in "PR-2015-00810 Stage 1 Release_paginated.pdf."

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Fax: (206) 623-1432

9. I did my best to accurately sort and categorize the emails and documents I reviewed and believe that my categorizations are accurate.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED this 28th day of July, 2016.

William Dale

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

EXHIBIT F
TO KUSSMANN DEC.

The Honorable Jeffrey Ramsdell
Noted for Hearing on August 5, 2016 at 9:00 am
Oral Argument Requested

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, a labor union

Petitioners,

vs.

THE UNIVERSITY OF WASHINGTON, an agency of the State of Washington, and FREEDOM FOUNDATION, an organization

Respondents.

No. 16-2-09719-7 SEA

DECLARATION OF KEENAN LAYTON IN SUPPORT OF PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION

Keenan Layton declares as follows:

1. I am over the age of 18, am competent to be a witness in this matter, and make the following declaration based upon my personal knowledge.

2. I am employed by Douglas Drachler McKey & Gilbrough as a legal assistant.

3. Between approximately June 17, 2016 and July 5, 2016, I reviewed pages 002471-003913, of a document, entitled "PR-2015-00810 Stage 1 Release_paginated.pdf." I sorted the pages reviewed into the following categories:

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Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

(1) Emails and documents relating to UW business (public records).

(2) Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925.

(3) Postings to the AAUP UW Chapter listserver.

(4) Personal emails and/or documents unrelated to any UW business.

(5) Personal emails sent or received by Professor Rob Wood in his capacity as AAUP UW Chapter President and unrelated to UW business.

(6) Emails containing lists of individuals.

Many of the documents fall within more than one of the above categories.

4. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 1** (Emails and documents relating to UW business (public records):

- 002531-002531
- 003084-003084
- 003338-003340
- 003415-003417
- 003420-003423
- 003428-003435
- 003491-003500

5. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 2** (Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925):

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

- 002476-002486
- 002492-002497
- 002501-002505
- 002512-002524
- 002529-002530
- 002532-002616
- 002623-002623
- 002626-002628
- 002631-002668
- 002676-002835
- 002839-002922
- 002924-002969
- 002972-002977
- 002980-002983
- 002985-003029
- 003032-003049
- 003053-003079
- 003088-003093
- 003096-003097
- 003100-003110
- 003113-003115
- 003118-003127
- 003129-003153
- 003155-003199
- 003201-003298
- 003300-003300
- 003321-003323

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Phone: (206) 623-0900
Fax: (206) 623-1432

- 003333-003347
- 003349-003361
- 003364-003378
- 003385-003414
- 003418-003419
- 003424-003427
- 003436-003470
- 003473-003490
- 003501-003541
- 003549-003572
- 003576-003582
- 003587-003738
- 003742-003751
- 003754-003755
- 003760-003773
- 003776-003776
- 003779-003851
- 003854-003913

6. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 3** (postings to the AAUP UW Chapter listserver):

- 002498-002500
- 002602-002605
- 002648-002651
- 002701-002706
- 002963-002964
- 002973-002977

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1904 Third Ave., Suite 1030
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Phone: (206) 623-0900
Fax: (206) 623-1432

- 002985-002986
- 002993-002301
- 003006-003010
- 003014-003026
- 003032-003038
- 003040-003049
- 003081-003083
- 003105-003107
- 003114-003115
- 003136-003140
- 003155-003181
- 003191-003197
- 003205-003210
- 003213-003249
- 003256-003265
- 003268-003276
- 003278-003282
- 003291-003298
- 003308-003311
- 003315-003320
- 003324-003328
- 003336-003337
- 003343-003347
- 003349-003353
- 003385-003389
- 003396-003399
- 003453-003458

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Phone: (206) 623-0900
Fax: (206) 623-1432

- 003461-003472
- 003452-003546
- 003552-003555
- 003564-003575
- 003770-003771
- 003774-003775
- 003798-003803
- 003823-003834
- 003840-003843

7. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 4** (Personal emails and/or documents unrelated to any UW business):

- 002620-002622
- 003005-003005
- 003324-003328
- 003344-003347
- 003522-003524
- 003542-003546
- 003752-003753

8. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 5** (personal emails sent or received by Professor Rob Wood in his capacity as AAUP UW Chapter President and unrelated to UW business):

- 002471-002530
- 002536-002571
- 002574-002581
- 002591-002591
- 002593-002595

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Phone: (206) 623-0900
Fax: (206) 623-1432

- 002602-002619
- 002623-002625
- 002627-002651
- 002666-002667
- 002669-002675
- 002678-002686
- 002688-002697
- 002703-002730
- 002733-002738
- 002740-002742
- 002825-002826
- 002836-002838
- 002841-002843
- 002901-002909
- 002918-002921
- 002923-002927
- 002932-002933
- 002936-002943
- 002946-002947
- 002958-002986
- 002993-002004
- 003006-003026
- 003030-003038
- 003040-003052
- 003056-003065
- 003080-003083
- 003085-003087

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Phone: (206) 623-0900
Fax: (206) 623-1432

- 003094-003095
- 003098-003100
- 003102-003104
- 003108-003117
- 003120-003128
- 003136-003140
- 003154-003181
- 003185-003187
- 003191-003197
- 003200-003200
- 003205-003210
- 003214-003251
- 003268-003276
- 003278-003282
- 003291-003292
- 003299-003304
- 003308-003320
- 003329-003337
- 003343-003343
- 003348-003353
- 003362-003371
- 003375-003389
- 003396-003408
- 003410-003411
- 003414-003414
- 003418-003419
- 003424-003427

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Phone: (206) 623-0900
Fax: (206) 623-1432

- 003436-003444
- 003453-003458
- 003461-003470
- 003475-003480
- 003529-003541
- 003547-003551
- 003561-003551
- 003561-003586
- 003589-003689
- 003726-003732
- 003739-003741
- 003750-003751
- 003756-003762
- 003766-003769
- 003739-003741
- 003750-003751
- 003756-003762
- 003766-003769
- 003777-003781
- 003796-003803
- 003828-003838
- 003840-003863
- 003868-003876

9. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 6** (Emails containing lists of individuals):

- 002481-002481
- 002521-002522

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Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

- 002525-002528
- 002536-002569
- 002572-002573
- 002582-002590
- 002593-002601
- 002606-002616
- 002623-002625
- 002627-002634
- 002652-002657
- 002666-002667
- 002678-002686
- 002696-002697
- 002707-002709
- 002713-002718
- 002720-002723
- 002743-002822
- 002825-002826
- 002841-002843
- 002918-002921
- 002932-002933
- 002948-002953
- 002302-003004
- 003085-003087
- 003111-003112
- 003116-003117
- 003203-003204
- 003315-003317

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

- 003369-003371
- 003400-003403
- 003438-003444
- 003449-003452
- 003525-003527
- 003529-003541
- 003549-003551
- 003561-003563
- 003589-003732
- 003739-003741
- 003754-003755
- 003770-003771
- 003779-003784
- 003831-003834
- 003840-003843
- 003877-003879
- 003881-003913

10. Many of the documents reviewed are duplicates because they are part of an email chain and it appears that each time a new email is attached to the chain, the entire chain is reproduced in "PR-2015-00810 Stage 1 Release_paginated.pdf."

11. I did my best to accurately sort and categorize the emails and documents I reviewed and believe that my categorizations are accurate.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED this 28th day of July, 2016.

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

Keenan Layton

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

EXHIBIT G
TO KUSSMANN DEC.

The Honorable Jeffrey Ramsdell
Noted for Hearing on August 5, 2016 at 9:00 am
Oral Argument Requested

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, a labor union

Petitioners,

vs.

THE UNIVERSITY OF WASHINGTON, an agency of the State of Washington, and FREEDOM FOUNDATION, an organization

Respondents.

No. 16-2-09719-7 SEA

DECLARATION OF BROOKE LATHER IN SUPPORT OF PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION

Brooke Lather declares as follows:

1. I am over the age of 18, am competent to be a witness in this matter, and make the following declaration based upon my personal knowledge.

2. I was Organizing Support Specialist at the Service Employees International Union ("SEIU 925") on July 5, 2016.

3. Between approximately June 29, 2016 and July 5, 2016, I reviewed pages 00087-00627 of a document, entitled "PR-2015-00810 Stage 1 Release_paginated.pdf." I sorted the pages reviewed into the following categories:

(1) Emails and documents relating to UW business (public records).

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Fax: (206) 623-1432

(2) Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925.

(3) Postings to the AAUP UW Chapter listserver.

(4) Personal emails and/or documents unrelated to any UW business.

(5) Personal emails sent or received by Professor Rob Wood in his capacity as AAUP UW Chapter President and unrelated to UW business.

(6) Emails containing lists of individuals.

Many of the documents fall within more than one of the above categories.

4. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 1** (emails and documents relating to UW business (public records)):

- 00090 – 00092
- 00097 – 00102
- 00139 – 00140

5. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 2** (Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925):

- 00087-00089
- 00093-00096
- 00103-00105
- 00214-00221

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Phone: (206) 623-0900
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- 00235-00240
- 00257-00260
- 00268-00272
- 00277-00285

6. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 3** (postings to the AAUP UW Chapter listserver):

- 00087-00087
- 00113-00117
- 00133-00138
- 00235-00240
- 00261-00263
- 00343-00354
- 00361-00365
- 00402-00498
- 00500-00514
- 00525-00524
- 00562-00565
- 00567-00601

7. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 4** (personal emails and/or documents unrelated to any UW business):

- 00087-00087

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Phone: (206) 623-0900
Fax: (206) 623-1432

- 00093-00096
- 00103-00105
- 00111-00112
- 00361-00365

8. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 5** (Personal emails sent or received by Professor Rob Wood in his capacity as AAUP UW Chapter President and unrelated to UW business):

- 00088-00089
- 00106-00110
- 00113-00342
- 00355-00360
- 00366-00627

9. Many of the documents reviewed are duplicitous because they are part of an email chain, and it appears that each time a new email is attached to the chain, the entire chain is reproduced in "PR-2015-00810 Stage 1 Release_paginated.pdf."

10. I did my best to accurately sort and categorize the emails and documents I reviewed and believe that my categorizations are accurate.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED this 28th day of July, 2016.

Brooke Lather

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

EXHIBIT H
TO KUSSMANN DEC.

The Honorable Jeffrey Ramsdell
Noted for Hearing on August 5, 2016 at 9:00 am
Oral Argument Requested

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, a labor union

Petitioners,

vs.

THE UNIVERSITY OF WASHINGTON, an agency of the State of Washington, and FREEDOM FOUNDATION, an organization

Respondents.

No. 16-2-09719-7 SEA

DECLARATION OF JACOB METZGER IN SUPPORT OF PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION

Jacob Metzger declares as follows:

1. I am over the age of 18, am competent to be a witness in this matter, and make the following declaration based upon my personal knowledge.

2. I am an attorney at Douglas Drachler McKey & Gilbrough.

3. Between approximately June 17, 2016 and July 5, 2016, I reviewed pages 000000-000086, pages 000806-001023, and pages 001347-002470 of a document, entitled "PR-

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

2015-00810 Stage 1 Release_paginated.pdf." I sorted the pages reviewed into the following categories:

(1) Emails and documents relating to UW business (public records).

(2) Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925.

(3) Postings to the AAUP UW Chapter listserver.

(4) Personal emails and/or documents unrelated to any UW business.

(5) Personal emails sent or received by Professor Rob Wood in his capacity as AAUP UW Chapter President and unrelated to UW business.

(6) Emails containing lists of individuals.

Many of the documents fall within more than one of the above categories.

4. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 1** (Emails and documents relating to UW business (public records):

- 000007-000013
- 000015-000022
- 001432-001433
- 001462-001462
- 001465-001465
- 001568-001569
- 001963-001963
- 001998-002008
- 002013-002015

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1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

- 002018-002022
- 002045-002048
- 002062-002064
- 002083-002087

5. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 2** (Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925):

- 000001-000002
- 000014-000014
- 000030-000031
- 000079-000080
- 000084-.000086
- 000826-000852
- 000861-000861
- 000863-000879
- 000903-000906
- 000911-000926
- 000934-000934
- 000937-000938
- 000959-000989
- 000992-000995
- 000999-001023
- 001352-001366
- 001369-001381
- 001395-001398

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1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

- 001402-001415
- 001420-001424
- 001427-001431
- 001434-001461
- 001463-001464
- 001466-001537
- 001548-001550
- 001562-001563
- 001570-001570
- 001573-001575
- 001581-001581
- 001588-001737
- 001740-001742
- 001749-001752
- 001768-001845
- 001853-001871
- 001879-001889
- 001896-001910
- 001918-001939
- 001944-001952
- 001957-001962
- 001970-001971
- 001976-001977
- 001982-001997
- 002009-002010
- 002016-002017
- 002023-002044

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1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

- 002049-002057
- 002065-002082
- 002088-002090
- 002093-002093
- 002100-002109
- 002113-002155
- 002157-002175
- 002186-002195
- 002204-002207
- 002215-002218
- 002221-002226
- 002250-002264
- 002269-002347
- 002352-002357
- 002370-002372
- 002376-002380
- 002388-002390
- 002398-002405
- 002408-002435
- 002437-002464
- 002467-002469

6. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 3** (postings to the AAUP UW Chapter listserver):

- 000001-000002
- 000028-000029
- 000054-000056

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1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

- 000806-000825
- 000862-000862
- 000939-000956
- 001571-001572
- 001582-001587
- 001890-001895
- 001911-001917
- 002246-002249

7. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 4** (Personal emails and/or documents unrelated to any UW business):

- 000066-000066
- 001366-001366
- 001571-001572
- 001775-001775
- 002128-002130
- 002152-002152
- 002199-002203
- 002208-002214
- 002246-002249

8. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 5** (personal emails sent or received by Professor Rob Wood in his capacity as AAUP UW Chapter President and unrelated to UW business):

- 000003-000006
- 000014-000014
- 000023-000027
- 000030-000065

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

- 000067-000086
- 000806-000812
- 000826-000861
- 000863-000920
- 000927-000933
- 000935-000936
- 000939-000958
- 000972-000976
- 000990-000991
- 000996-001002
- 001005-001016
- 001347-001351
- 001367-001368
- 001382-001394
- 001396-001401
- 001416-001419
- 001425-001426
- 001434-001438
- 001441-001441
- 001466-001495
- 001501-001504
- 001514-001517
- 001528-001532
- 001538-001547
- 001551-001561
- 001564-001570
- 001574-001580

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

- 001600-001601
- 001717-001718
- 001727-001730
- 001738-001739
- 001741-001771
- 001782-001800
- 001813-001813
- 001819-001819
- 001825-001828
- 001838-001841
- 001844-001852
- 001872-001878
- 001880-001889
- 001896-001901
- 001911-001917
- 001932-001935
- 001940-001962
- 001964-001969
- 001972-001997
- 002009-002012
- 002016-002017
- 002023-002044
- 002049-002054
- 002058-002061
- 002065-002104
- 002106-002127
- 002131-002151

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

- 002156-002172
- 002176-002198
- 002219-002245
- 002254-002258
- 002262-002276
- 002278-002292
- 002295-002326
- 002328-002467
- 002469-002469

9. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 6** (Emails containing lists of individuals):

- 000959-000971
- 001367-001368
- 001434-001438
- 001556-001561
- 001568-001569
- 001743-001746
- 001813-001813
- 001819-001819
- 001825-001828
- 001838-001841
- 001844-001845

10. Many of the documents reviewed are duplicates because they are part of an email chain and it appears that each time a new email is attached to the chain, the entire chain is reproduced in "PR-2015-00810 Stage 1 Release_paginated.pdf."

11. I did my best to accurately sort and categorize the emails and documents I reviewed and believe that my categorizations are accurate.

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED this 28th day of July, 2016.

Jacob Metzger

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

EXHIBIT I
TO KUSSMANN DEC.

The Honorable Jeffrey Ramsdell

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, a labor union

Petitioners,

vs.

THE UNIVERSITY OF WASHINGTON, an agency of the State of Washington, and FREEDOM FOUNDATION, an organization

Respondents.

No. 16-2-09719-7 SEA

THIRD DECLARATION OF JACOB METZGER IN SUPPORT OF PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION

Jacob Metzger declares as follows:

1. I am over the age of 18, am competent to be a witness in this matter, and make the following declaration based upon my personal knowledge.

2. I am an attorney at Douglas Drachler McKee & Gilbrough.

3. On Thursday, August 11, 2016 I became aware that some pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" were inadvertently not included in the declarations previously submitted by SEIU 925.

Douglas, Drachler, McKee & Gilbrough
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Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

4. The following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" were previously reviewed and categorized by William Dale, but inadvertently left out of his Second Declaration: 00628-00634, 00638-00641, 00648-00694, 00799-00805, 001024-001026, 001097, 001100-001104, 001120-001133, 001202-001205, 001267-001271.

5. The following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" were previously reviewed and categorized by Keenan Layton, but inadvertently left out of his Declaration: 003305-003307.

6. Page 002470 of "PR-2015-00810 Stage 1 Release_paginated.pdf" was inadvertently not reviewed or categorized prior to August 11, 2016.

7. After discovering that these pages were inadvertently not included in the declarations submitted by SIEU 925, I reviewed the pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" listed in paragraph 4, 5, and 6 of this declaration.

8. I sorted the pages reviewed into the following categories:

(1) Emails and documents relating to UW business (public records).

(2) Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925.

(3) Postings to the AAUP UW Chapter listserver.

(4) Personal emails and/or documents unrelated to any UW business.

(5) Personal emails sent or received by Professor Rob Wood in his capacity as AAUP UW Chapter President and unrelated to UW business.

(6) Emails containing lists of individuals.

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

Some of the documents fall within more than one of the above categories.

9. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 2** (Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925):

- 000628-000632
- 000648-000694
- 001097-001097
- 001100-001104
- 001120-001133
- 001202-001205
- 001267-001271
- 002470-002470
- 003305-003307

10. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 5** (personal emails sent or received by Professor Rob Wood in his capacity as AAUP UW Chapter President and unrelated to UW business):

- 00633-00634
- 00638-00641
- 00799-00805
- 001024-001026
- 001100-001104
- 001120-001133
- 001202-001205
- 001267-001271

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

11. I did my best to accurately sort and categorize the emails and documents I reviewed and believe that my categorizations are accurate.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED this 12th day of August, 2016.

Jacob Metzger

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

EXHIBIT J
TO KUSSMANN DEC.

The Honorable Jeffrey Ramsdell

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, a labor union

Petitioners,

vs.

THE UNIVERSITY OF WASHINGTON, an agency of the State of Washington, and FREEDOM FOUNDATION, an organization

Respondents.

No. 16-2-09719-7 SEA

FOURTH DECLARATION OF JACOB METZGER IN SUPPORT OF PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION

Jacob Metzger declares as follows:

1. I am over the age of 18, am competent to be a witness in this matter, and make the following declaration based upon my personal knowledge.

2. I am an attorney at Douglas Drachler McKee & Gilbrough.

3. On Friday, September 9, 2016 I became aware that some pages of "PR-2015-00810 Stage 1 Release_paginated.pdf' were inadvertently not included in the declarations previously submitted by SEIU 925.

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

4. The following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" were previously reviewed and categorized by William Dale, but inadvertently left out of his Second Declaration: 001107-001108 and 001117-001118.

5. After discovering that these pages were inadvertently not included in the declarations submitted by SIEU 925, I reviewed pages 001107-001108 and 001117-001118 of "PR-2015-00810 Stage 1 Release_paginated.pdf" on September 12, 2016.

6. I sorted the pages reviewed into the following categories:

(1) Emails and documents relating to UW business (public records).

(2) Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925.

(3) Postings to the AAUP UW Chapter listserver.

(4) Personal emails and/or documents unrelated to any UW business.

(5) Personal emails sent or received by Professor Rob Wood in his capacity as AAUP UW Chapter President and unrelated to UW business.

(6) Emails containing lists of individuals.

7. I categorized the following pages of "PR-2015-00810 Stage 1 Release_paginated.pdf" as **Category 2** (Emails and documents about faculty organizing, including emails containing opinions and strategy in regard to faculty organizing and direct communications with SEIU 925):

- 001107-001108
- 001117-001118

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

8. I did my best to accurately sort and categorize the emails and documents I reviewed and believe that my categorizations are accurate.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED this 11th day of September, 2016.

Jacob Metzger

Douglas, Drachler, McKee & Gilbrough
1904 Third Ave., Suite 1030
Seattle, WA 98101
Phone: (206) 623-0900
Fax: (206) 623-1432

EXHIBIT K
TO KUSSMANN DEC.

Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ.

Court of Appeals of Michigan

January 26, 2010, Decided

No. 288977

Reporter
287 Mich. App. 228 *; 789 N.W.2d 495 **; 2010 Mich. App. LEXIS 143 ***; 30 I.E.R. Cas. (BNA) 594; 188 L.R.R.M. 2054

HOWELL EDUCATION ASSOCIATION MEA/NEA, DOUG NORTON, JEFF HUGHEY, JOHNSON MCDOWELL, and BARBARA CAMERON, Plaintiffs/Counter-Defendants/Appellants, v HOWELL BOARD OF EDUCATION and HOWELL PUBLIC SCHOOLS, Defendants/Appellees and CHETLY ZARKO Intervenor/Counter-Plaintiff/Appellee.

Subsequent History: Motion granted by *Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ., 781 N.W.2d 307, 2010 Mich. LEXIS 892 (Mich., 2010)*

Leave to appeal denied by, Motion granted by *Howell Eduction Ass'n MEA/NEA v. Howell Bd. of Educ., 2010 Mich. LEXIS 2608 (Mich., Dec. 29, 2010)*

Prior History: [***1] Livingston Circuit Court. LC No. 07-22850-CK.

Core Terms

e-mail, public record, technology, official function, public body, communications, trial court, employees, exemption, documents, captured, teachers, computer system, disclosure, retention, defendants', users, requests, Schools, privacy, summary disposition, agency record, text message, instructional, negotiations, bargaining, electronic, mailboxes, calendar, township

Case Summary

Procedural Posture

Plaintiffs, teachers and a union, brought a "reverse" action under the Freedom of Information Act (FOIA), *MCL 15.231 et seq.*, against defendants, a board of education and a public school system, after intervening defendant requestor sought certain e-mails. The Livingston Circuit Court (Michigan) granted summary judgment to defendants and dismissed the action. Plaintiffs appealed.

Overview

The teachers were all union officials. The appeal was limited to the question of whether the trial court properly concluded that all e-mails generated through defendants' e-mail system that were retained or stored by defendants were public records. The court stated that in order for the documents to be public records under *MCL 15.232(e)*, they had to have been stored or retained by defendants in the performance of an official function. The retention of the e-mails here was nothing more than a blanket saving of all information captured through a back-up system that did not distinguish between e-mails sent pursuant to educational goals and those sent by employees for personal reasons. The back-up system did not constitute an "official function" sufficient to render the personal e-mails public records subject to the FOIA. Next, the e-mails involving internal union communications were personal e-mails. They did not involve teachers acting in their official capacity as public employees, but in their personal capacity as union members or leadership. The release of those e-mails would only reveal information regarding the affairs of a labor organization, which was not a public body.

Outcome

The court reversed the trial court's decision. It remanded the case for further proceedings consistent with its opinion.

LexisNexis® Headnotes

Administrative Law > Governmental Information > Freedom of Information > Reverse Freedom of Information Act Actions

HN1[] A reverse claim under the Freedom of Information Act (FOIA), MCL 15.231 et seq., is one where a party seeks to prevent disclosure of public records under the FOIA.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN2[] An appellate court reviews de novo both issues of statutory interpretation and a trial court's decision to grant summary disposition.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

HN3[] Consistent with the legislatively stated public purpose supporting the act, the Michigan Freedom of Information Act, MCL 15.231 et seq., requires disclosure of the public records of a public body to persons who request to inspect, copy, or receive copies of those requested public records. MCL 15.232(d)(iii). A "public record" is "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(e).

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN4[] There is a statutory clause reading "from the time it is created" found in the definition of "public record" in MCL 15.232(e). The Court of Appeals of Michigan does not construe this clause as requiring that a writing be owned, used, in the possession of, or retained by a public body in the performance of an official function from the time the writing is created in order to be a public record. A writing can become a public record after its creation. The court understands the phrase "from the time it is created" to mean that the ownership, use, possession, or retention by the public body can be at any point from creation of the record onward.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN5[] Mere possession of a record by a public body does not render the record a public document. Rather, the use or retention of the document must be in the performance of an official function. MCL 15.232(e).

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

HN6[] Unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee. The same is true for all public body employees.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN7[] Federal court decisions regarding whether an item is an "agency record" under the federal Freedom of Information Act are persuasive in determining whether a record is a "public record" under the Michigan Freedom of Information Act, MCL 15.231 et seq.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

HN8[] MCL 15.243(1)(a) provides that public records may be exempt from disclosure where they contain information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. The question whether a writing is a public document or a private one not involved in the performance of an official function is separate and distinct from the question whether the document falls within the so-called "privacy exemption." Implicit in this statement is that some documents are not public records because they are private while other documents are public records but will fall within the privacy exemption.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

Computer & Internet Law > Privacy & Security > General Overview

Education Law > Faculty & Staff > General Overview

HN9[] Personal information that falls within privacy exemption includes home addresses and telephone numbers. Thus, when someone makes a request for an employee's personnel file under the Freedom of Information Act (FOIA), *MCL 15.231 et seq.*, the personnel file is a public record, but the employee's home address and telephone number may be redacted because they are subject to the privacy exclusion in *MCL 15.243(1)(a)*. The employee's home address and telephone number are examples of private information contained within a public record. In contrast, an e-mail sent by a teacher to a family member or friend that involves an entirely private matter such as carpooling, childcare, lunch or dinner plans, or other personal matters, is wholly unrelated to the public body's official function. Such e-mails simply are not public records.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Computer & Internet Law > Privacy & Security > General Overview

HN10[] The Court of Appeals of Michigan is not persuaded that a public employee's misuse of the technology resources provided by their employer, by sending private e-mails, renders those e-mails public records.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN11[] The case law is clear that purely personal documents can become public documents based on how they are utilized by public bodies. However, it is their subsequent use or retention in the performance of an official function that rendered them so.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN12[] The underlying policy of the Freedom of Information Act (FOIA), *MCL 15.231 et seq.*, is to inform the public regarding the affairs of government and the official acts of public employees. *MCL 15.231(2)*. The purpose of FOIA must be considered in resolving ambiguities in the definition of "public record."

Administrative Law > Governmental Information > Freedom of Information > General Overview

Computer & Internet Law > Privacy & Security > General Overview

HN13[] The Freedom of Information Act, *MCL 15.231 et seq.*, was not intended to render all personal e-mails public records simply because they are captured by the computer system's storage mechanism as a matter of technological convenience.

Counsel:

Judges: Before: CAVANAGH, P.J., and FITZGERALD and SHAPIRO, JJ.

Opinion

[*231] [497]** PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition to defendants and dismissal of their "reverse" Freedom of Information Act (FOIA), *MCL 15.231 et seq.*, action. [1] We reverse and remand for further proceedings consistent with this opinion. While we believe the issue in this case is one that must be resolved by the Legislature, and we call upon the Legislature to address it, we conclude that under the FOIA statute the individual plaintiffs' personal e-mails were not rendered public records solely because they were captured in a public body's e-mail system's digital memory. Additionally, we conclude that mere violation of an acceptable use policy barring personal use of the e-

[1] *HN1*[] A "reverse FOIA" claim is one where a party "seek[s] to prevent disclosure of public records under the FOIA." *Bradley v Saranac Community Sch Bd of Ed, 455 Mich 285, 290; 565 NW2d 650 (1997)*.

mail system--at least one that does not expressly provide that e-mails are subject to FOIA--does not render personal e-mails public records subject to FOIA.

I. FACTUAL AND PROCEDURAL BACKGROUND

In March 2007, the intervenor, Chetly [***2] Zarko, began submitting a series of FOIA requests to defendant Howell Public Schools (HPS), including requests for all e-mail beginning January 1, 2007, sent to and from three HPS teachers: plaintiffs Doug Norton, Jeff Hughey, and Johnson McDowell. During that time, each of these teachers was also a member and official for plaintiff Howell Education Association, MEA/NEA (HEA); Norton was president, Hughey was vice president for bargaining, and McDowell was vice president for grievances. After the filing of this lawsuit, Zarko also requested all e-mail sent to or from plaintiff Barbara Cameron that was to or from Norton, McDowell, [*232] and Hughey. Cameron is the UniServ Director employed by the Michigan Education Association to provide representational services to the HEA. The requests were apparently made in the context of heated negotiations for a new collective [**498] bargaining agreement that were being reported in the local media.

The HEA objected to having to release union communications sent between HEA leaders or between HEA leaders and HEA members and took the position that, to the extent the e-mails addressed union matters, they were not "public records" as defined under FOIA. The HEA asked [***3] counsel for HPS to confirm whether the internal union communications of Norton, Hughey, and McDowell would be treated as non-disclosable. Counsel for HPS noted that there was no reported caselaw regarding whether personal e-mails or internal union communications maintained on the computer system of a public body were public records subject to disclosure under FOIA and suggested a "friendly lawsuit" to determine the applicability of FOIA to the e-mail requests made by Zarko.

Plaintiffs filed their complaint in May 2007 against HPS and defendant Howell Board of Education requesting a declaratory judgment that: (1) personal e-mails and e-mails pertaining to union business are not "public records" as defined by FOIA; (2) that the collective bargaining e-mails were exempt pursuant to *MCL 15.243(1)(m)*; and (3) that the e-mails containing legal advice were exempt pursuant to *MCL 15.243(1)(g)*. Plaintiffs also requested an injunction to prevent the release of the documents until the issues could be resolved. A temporary restraining order (TRO) was entered on May 7, 2007. Following a show cause hearing, Zarko was permitted to intervene as an intervening defendant and counter-plaintiff, the TRO was extended [***4] [*233] "until further notice," and the parties agreed to organize all the e-mails for an in camera review. The parties were directed to release all uncontested e-mails and to deliver to the court all e-mails they contended were either not public records, or were subject to an exemption under FOIA.

The trial court appointed a special master to review approximately 5,500 e-mails. [2] At the same time, plaintiffs informed the trial court that they were withdrawing their request to defendants that an exemption under *MCL 15.243(1)(m)* be asserted regarding e-mail sent between one or more plaintiffs and the school administration. Defendants then released those e-mails to Zarko.

Defendants moved for summary disposition in July 2008, arguing that plaintiffs lacked standing to prevent disclosure because all the documents were public records and only defendants had the authority to assert the exemption provisions of *MCL 15.232*. Defendants also argued that the trial court could not grant relief to Hughey given that his e-mail had already [***5] been released and could not grant relief as to any e-mail from the other plaintiffs to which Hughey was a party because that e-mail was "no longer secret." Defendants argued that any exemption under *MCL 15.243(1)(m)* was inapplicable because the collective bargaining agreement had already been reached. Thus, there could be no harm to the collective bargaining negotiations, as the negotiations had concluded. Finally, defendants argued that plaintiffs were not entitled to injunctive relief because they could not show irreparable harm.

[*234] The trial court held a hearing on defendants' motion for summary disposition. As to the injunction, the trial court concluded that plaintiffs lacked standing to [**499] assert the claim. As to the claimed exemptions, the trial court concluded that those issues were moot "because the disputed emails have been released to the intervenor," resulting in a lack of an actual controversy. Finally, the trial court concluded that "any emails generated through the District's email system, that are retained or stored by the district, are indeed 'public records' subject to FOIA. . . ." Plaintiffs now appeal.

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[2] These emails did not include any to or from Hughey. On May 2, 2007, before the suit was filed, the review of these e-mails was completed and defendants released the e-mails to Zarko.

II. STANDARD OF REVIEW

The issue before us is one [***6] of statutory interpretation and arises in the context of a summary disposition motion. HN2[↑] We review de novo both issues of statutory interpretation and a trial court's decision to grant summary disposition. *Mich Federation of Teachers v Univ of Mich, 481 Mich 657, 664; 753 NW2d 28 (2008)*.

III. ANALYSIS

The issue before us requires us to consider the application of the FOIA statute, adopted in 1977 and last amended in 1997, in the context of today's ubiquitous e-mail technology. This is a challenging issue and one that, as we noted at the outset, we believe is best left to the Legislature because it is plainly an issue concerning social policy. Unfortunately, until the Legislature makes its intention clear by adopting statutory language that takes this technology into account, we must attempt to discern, as best we can given the tools available to us, what the intent of the Legislature would have been under the circumstances presented by this technology that it could not have foreseen. Cf. *Denver Publishing Co v Bd of Co Comm'rs of Arapahoe Colorado, 121 P3d 190, 191-192 [*235] (Colo, 2005)*. We find ourselves in the situation akin to that of a court being asked to apply the laws governing transportation adopted [***7] in a horse and buggy world to the world of automobiles and air transportation.

HN3[↑] "Consistent with the legislatively stated public policy supporting the act, the Michigan FOIA requires disclosure of the 'public record[s]' of a 'public body' to persons who request to inspect, copy, or receive copies of those requested public records." *Mich Federation of Teachers, 481 Mich at 664-665*. It is undisputed that defendants are public bodies. *MCL 15.232(d)(iii)*. A "public record" is "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." [3] *MCL 15.232(e)*. Plaintiffs have specifically limited their appeal to whether the trial court properly concluded that all e-mails generated through defendants' e-mail system [**500] that are retained or stored by defendants are public records subject to FOIA. [4]

[*236] The trial court determined that the personal e-mails are public records because they are "in the possession of, or retained by" defendants. See *MCL 15.232(e)*. However, HN5[↑] "mere possession of a record by a public body" does not render the record a public document. *Detroit News, Inc v Detroit, 204 Mich App 720, 724; 516 NW2d 151 (1994)*. Rather, the use or [***9] retention of the document must be "in the performance of an official function." See *id. at 725*; *MCL 15.232(e)*. For the e-mails at issue to be public records, they must have been stored or retained by defendants in the performance of an official function.

Defendants argue that retention of electronic data is an official function where it is required for the operation of an educational institution, citing *Kestenbaum v Mich. State Univ, 414 Mich 510; 327 NW2d 783 (1982)*. [5] However, the lead opinion in *Kestenbaum* "accept[ed] without deciding" that the electronic data at issue was a public record. *Id. at 522 (FITZGERALD, J.)*. Only Justice RYAN's opinion addressed the issue of "an official function." *Id. at 538-539 (RYAN, J.)*. Justice RYAN concluded that the magnetic tape involved, which was the school's purposefully created and retained record of student names and addresses, was, in fact, "prepared, owned, used, processed, and retained by the defendant public body 'in the performance of an official function'" because the university could not have functioned

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[3] Although unnecessary for the resolution of this case, we wish to address the suggestion of amicus curiae Mackinac Center for Public Policy that the "it" in the clause "from the time it is created" refers to the public body. The amicus asserts that interpreting the "it" as a writing would cause the overruling of *Detroit News, Inc v Detroit, 204 Mich App 720; 516 NW2d 151 (1994)*. [***8] However, this ignores that *Detroit News* explicitly interpreted the "it" as meaning a writing:

> The city relies on the HN4[↑] statutory clause "from the time it is created" found in the definition of public record. We do not construe this clause as requiring that a writing be "owned, used, in the possession of, or retained by a public body in the performance of an official function" from the time the writing is created in order to be a public record. A writing can become a public record after its creation. We understand the phrase "from the time it is created" to mean that the ownership, use, possession, or retention by the public body can be at any point from creation of the record onward. [*Id. at 725*.]

Accordingly, we reject the suggested interpretation.

[4] Thus, we are not ruling on whether any exemptions apply or who has the standing to argue them.

[5] *Kestenbaum* was a three to three decision and has no majority opinion.

"'without such a list of students.'" *Id. at 539*.

In the present case, defendants [***10] can function without the personal e-mail. There is nothing about the personal e-mail, given that by their very definition they have nothing to do with the operation of the schools, which indicates that they are required for the operation of an [*237] educational institution. Thus, we decline to conclude that they are equivalent to the student information at issue in *Kestenbaum*. Furthermore, *HN6*[↑] "unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee." *Id.* We believe the same is true for all public body employees. Absent specific legislative direction to do so, we are unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA.

Defendants offer a simple solution approach to this puzzle, which is to simply say that anything on the school's computer system is "retained" by the school and therefore subject to FOIA. However, the school district does not assert that its back-up system was purposely designed to retain and store personal e-mail or that personal e-mail has some official function. It appears that the system is intended to retain [***11] and store e-mail relating to official functions, but that it is simply easier technologically to capture all the e-mail on the system rather than have some mechanism to distinguish them. We do not think that because the technological net used to capture public record e-mail also automatically captures other e-mails we must conclude that the other e-mails are public records. [6] [**501] To rule as defendants request would essentially render all personal e-mail sent by governmental employees while at work subject to public release upon request. We conclude that this was not the intent of the Legislature when it passed FOIA.

[*238] E-mail has in essence replaced mailboxes and paper memos in government offices. Schools have traditionally, as part of their function, provided teachers with mailboxes in the school's main office. However, [***12] we have never held nor has it even been suggested that during the time those letters are "retained" in those school mailboxes they are automatically subject to FOIA. Now, instead of physical mailboxes, we have e-mail. However, the nature of the technology is such that even after the e-mail letter has been "removed from the mailbox" by its recipient, a digital copy of it remains, possibly in perpetuity. This effect is due solely to a change in the technology being used and, absent some showing that the retention of personal email has some official function other than the retention itself, we decline to so drastically expand the scope of FOIA. We do not suggest that a change in technology cannot be a part of the circumstances that would result in a significant change in the scope of a statute. However, where the change in technology is the sole factor, we should be very cautious in expanding the scope of the law.

This position is consistent with federal cases interpreting whether an item is an "agency record" under the federal FOIA. [7] In *Bloomberg, LP v Securities & Exch Comm, 357 F Supp 2d 156 (DDC, 2004)*, the court determined that the electronic calendar for the chairman of the Securities and Exchange Commission (SEC) was not an "agency record." *Id. at 164*. [***13] This was true even though the calendar included both personal and business appointments and "the calendar was maintained on the agency computer system [*239] and backed-up every thirty days . . . ." *Id.* The plaintiff had argued that the backing-up process integrated the calendar into the agency record system. *Id.* The SEC countered that employees were "permitted 'limited use of government office equipment for personal needs'" and that the routine back-up system did "not distinguish between personal and SEC business-related documents." *Id.* In making its determination, the court reiterated that "'employing agency resources, standing alone, is not sufficient to render a document an 'agency record.'" *Id.* (citation omitted). [8]

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[6] Indeed, we should not presume that the question would even end with personal e-mail sent on government computers. At oral argument, defendants would not concede that employees' personal e-mail would not be subject to FOIA even if the employees sent it on their personal laptop computers if, because the laptops used a government wireless system, the e-mail was captured and retained.

[7] *HN7*[↑] "Federal court decisions regarding whether an item is an 'agency record' under the federal FOIA are persuasive in determining whether a record is a 'public record' under the Michigan FOIA." *MacKenzie v Wales Twp, 247 Mich App 124, 129 n 1; 635 NW2d 335 (2001)*.

[8] We note that the United States Supreme Court has granted certiorari in the case of *City of Ontario, California v Quon, U.S. , 130 S. Ct. 1011; 175 L. Ed. 2d 617 (2009)*. While that case involves an issue of privacy raised by new communications [***14] technology, it is unlikely to have any bearing on this case. In *Quon*, the city had an informal policy of allowing its employees to use their city-supplied pagers for

[**502] The e-mails in the present case are analogous to the electronic calendar and other personal uses of SEC office equipment. Defendants' storage and retention of personal e-mails is a byproduct of the fact that all e-mail is electronically retained, regardless of whether it was personal or business-related. We are not persuaded that personal e-mails are rendered "public records" under FOIA merely by use of a public body's computer system to send or receive those e-mails or by the automatic back-up system that causes [***15] the public body to "retain" those e-mails.

Contrary to Zarko's position, our determination that personal e-mails are not public records does not render [*240] MCL 15.243(1)(a) nugatory. HN8[↑] MCL 15.243(1)(a) provides that public records may be exempt from disclosure where they contain "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." As Justice RYAN noted in his opinion in Kestenbaum, 414 Mich at 539 n 6, "[t]he question whether a writing is a 'public document' or a private one not involved 'in the performance of an official function' is separate and distinct from the question whether the document falls within the so-called 'privacy exemption' . . . ." Implicit in this statement is that some documents are not public records because they are private while other documents are public records but will fall within the privacy exemption.

For example, HN9[↑] personal information that falls within this exclusion includes home addresses and telephone numbers. Mich Federation of Teachers, 481 Mich at 677. Thus, when someone makes a FOIA request for an employee's personnel file, the personnel file is a public record, [***16] Bradley v Saranac Community Sch Bd of Ed, 455 Mich 285, 288-289; 565 NW2d 650 (1997), but the employee's home address and telephone number may be redacted because they are subject to the privacy exclusion in MCL 15.243(1)(a). The employee's home address and telephone number are examples of private information contained within a public record. In contrast, an e-mail sent by a teacher to a family member or friend that involves an entirely private matter such as carpooling, childcare, lunch or dinner plans, or other personal matters, is wholly unrelated to the public body's official function. Such e-mails simply are not public records.

We recognize that the present case is distinguishable from Bloomberg, where limited use of the office equipment [*241] for "personal needs" was expressly permitted, because defendants' employees have no such permission. Before logging into defendants' computer system, users are greeted by the following statement:

> This is a Howell Public Schools computer system. Use of this system is governed by the Acceptable Use Policy which may be viewed at http://www.howellschools.com/aup.html.
>
> All data contained on any school computer system is *owned* by Howell Public Schools, and [***17] may be monitored, intercepted, recorded, read, copied, or captured in any manner by authorized school personnel. Evidence of unauthorized use may be used for administrative or criminal action.
>
> *By logging into this system, you acknowledge your consent to these terms and conditions of use.* [Emphasis added.]

Defendants' acceptable use policy provides, in relevant part:

> Howell Public Schools provides technology in furtherance of the educational goals and mission of the District. As [**503] part of the consideration for making technology available to staff and students, users agree to use this technology only for appropriate educational purposes. . . .
> * * *
>
> Email is not considered private communication. It may be re-posted. It may be accessed by others and is subject to subpoena. School officials reserve the right to monitor any or all activity on the district's computer system and to inspect any user's email files. *Users should not expect that their communications on the system are private.* Confidential information should not be transmitted via email.
> * * *
>
> Appropriate use of district technology is defined as a use to further the instructional goals and mission

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personal text messaging provided the employee paid the extra cost of service. Quon v Arch Wireless Operating Co, Inc, 529 F.3d 892, 897 (2008). Despite assurances that the city would not review the contents of the personal text messages, the city did so and an employee brought an action claiming violation of his Fourth Amendment right to be protected against unreasonable searches and seizures. Id. at 897-898. Because *Quon* involves the **Fourth Amendment** and not FOIA, it is unlikely to answer the question now before us.

> of the district. [*242] Members should consider [***18] any use outside these instructional goals and mission constitutes potential misuse . . . .
> * * *
> Members are prohibited from . . . [u]sing technology for personal or private business, . . . or political lobbying . . . .

Defendants argue that their acceptable use policy notified users that personal e-mail was subject to FOIA. We disagree. Although the use policy certainly gives notice to the users that school officials may look at their e-mail, and that the documents could be released pursuant to a subpoena, it in no way indicates that users' e-mail may be viewed by any member of the public who simply asks for it. Thus, we conclude that the public employees' agreement to this acceptable use policy did not render their personal e-mail subject to FOIA.

Furthermore, *HN10*[↑] we are not persuaded that a public employee's misuse of the technology resources provided by defendants, by sending private e-mails, renders those e-mails public records. The acceptable use policy makes clear that "[a]ppropriate use of district technology is defined as a use to further the instructional goals and mission of the district." An employee's use of a public body's technology resources for private communication is clearly [***19] not in the furtherance of the instructional goals of the public body. Although this is an inappropriate use that could subject the employee to sanction for violation of the policy, the violation does not transform personal communications into public records. Indeed, the fact that the communication is sent in violation of the use policy militates in favor of the conclusion that the e-mail is not a public record because it falls expressly outside the performance of an official function, i.e. the furtherance of the instructional goals of the district.

[*243] Our reasoning is also consistent with *Walloon Lake Water Sys, Inc v Melrose, 163 Mich App 726, 730; 415 NW2d 292 (1987)*. In *Walloon*, a letter was sent to the township supervisor that "pertained in some way to the water system provided by plaintiff to part of the township." *Id. at 728*. The letter was read aloud at the township board's regularly scheduled meeting. *Id. at 729*. The plaintiff subsequently sought a copy of the letter under FOIA, but the township refused to provide it, claiming it was not a public record. *Id.* This Court concluded that the letter was a public record because, "once the letter was read aloud and incorporated into the [***20] minutes of the meeting where the township conducted its business, it became a public record. 'used . . . in the performance of an official function.'" *Id. at 730*. [**504] Thus, *HN11*[↑] the caselaw is clear that purely personal documents can become public documents based on how they are utilized by public bodies. However, it is their subsequent use or retention "in the performance of an official function" that rendered them so. In the present case, the retention of the e-mail by defendants on which the trial court relied was nothing more than a blanket saving of all information captured through a back-up system that did not distinguish between e-mail sent pursuant to the district's educational goals and that sent by employees for personal reasons. The back-up system did not constitute an "official function" sufficient to render the e-mails public records subject to FOIA. See *Bloomberg, 357 F Supp 2d at 164*.

In reaching our decision, we have also considered two unpublished cases in which our Court has addressed issues that may be relevant. These cases are not precedential authority. However, given the limited published caselaw on the issue and the issue's significance, we have reviewed them for guidance. [***21] In *WDG Investment Co v Mich. Dep't of Mgt & Budget*, unpublished opinion [*244] per curiam of the Court of Appeals, issued October 25, 2002 (Docket No. 229950), a rejected bidder on a government project sued the state Department of Management and Budget (DMB), alleging fraud in the manner in which the bid was awarded. A second count in the action sought production, under FOIA, of the individual notes written by bid reviewing board members concerning the bids. The DMB asserted that it had no obligation to provide the notes because they were "personal" and not kept in the DMB files. This Court held that the notes were public records. We specifically noted that the defendants' use of the word "personal" was undefined and vague, stating "[i]t is not at all clear from the record what defendants mean by 'personal' notes. We therefore decline to address this argument at this time." *Id.*, slip op p 7, n 4. Thus, the case can offer only limited guidance. However, to the degree it is helpful, it indicates that individual notes taken by a decisionmaker on a governmental issue are still public records when they were taken in furtherance of an official function. This does not suggest, however, that notes sent from one governmental employee to another [***22] about a matter not in furtherance of an official function are also public records.

A similar approach was followed in *Hess v City of Saline*, unpublished opinion per curiam of the Court of

Appeals, issued May 12, 2005 (Docket No. 260394), which involved the use of video cameras to record a city council meeting. At some point, the council adjourned but the video camera was not turned off and it recorded conversations among city staffers who remained in the council chambers talking for some time after the council members had left. A copy of the videotape of the staffers' postmeeting conversations was sought under FOIA. We held that "the unedited videotape was not a public record. . . . [as] no official city business was [*245] conducted during that time" despite the fact that the city retained the unedited tape. *Id.*, unpub op at 2. The inadvertent taping of the conversations in *Hess* was due to human error in forgetting to turn off the recorder. The "taping" of the personal e-mail in this case was similarly inadvertent because, as a result of the nature of the capture technology, the recorder can never be turned off.

This is *not* to say that personal e-mails cannot become public records. For example, were a teacher to [***23] be subjected to discipline for abusing the acceptable use policy and personal e-mails were used to [**505] support that discipline, the use of those e-mails would be related to one of the school's official functions--the discipline of a teacher--and, thus, the e-mails would become public records subject to FOIA. This is consistent with *Detroit Free Press, Inc v Detroit, 480 Mich 1079; 744 NW2d 667 (2008)*. It is common knowledge that underlying that case was a wrongful termination lawsuit that resulted in a multi-million dollar verdict against the city of Detroit. During the course of the lawsuit and subsequent settlement negotiations, certain text messages became public, which had been sent between the Detroit mayor and a staff member through the staff member's city-issued mobile device. The text messages indicated that the mayor and the staff member had committed perjury. Two newspapers filed FOIA requests for the settlement agreement from the wrongful termination trial, along with various other documents. Our Supreme Court found no error in the trial court's determination that the settlement agreement was a public record subject to disclosure under FOIA. *Id.* However, the Supreme Court did *not* [***24] rule that the text messages themselves were public records. The Court's order denying leave to appeal contains no reference to text messages. Rather, [*246] the order indicated that the documents setting forth the settlement agreement were subject to FOIA. *Id.*

Having determined that the personal e-mails are not "public records" subject to FOIA, the next question is whether e-mails involving "internal union communications" [9] are personal e-mails. We conclude that they are. Such communications do not involve teachers acting in their official capacity as public employees, but in their personal capacity as HEA members or leadership. Thus, any e-mail sent in that capacity is personal. This holding is consistent with *HN12*[↑] the underlying policy of FOIA, which is to inform the public "regarding the affairs of government and the official acts of . . . public employees . . . ." *MCL 15.231(2)*. See *Walloon, 163 Mich App at 730* (holding that the purpose of FOIA "must be considered in resolving ambiguities in the definition of public record"). The release of e-mail involving internal union communications would only reveal information regarding the affairs of a labor organization, which is not a public body.

IV. CONCLUSION

This is a difficult question requiring that we apply a statute, whose purpose is to render government transparent, to a technology that did not exist in reality (or even in many people's imaginations) at the time the statute was enacted and that has the capacity to make "transparent" far more than the drafters of the statute could have dreamed. When the statute was adopted, [*247] personal notes between employees were simply thrown away or taken home and only writings related to the entity's public function were retained. Thus, we conclude that *HN13*[↑] the statute was not intended to render all personal e-mails public records simply because they are captured by the computer system's storage mechanism as a matter of technological convenience.

Accelerating communications technology has greatly increased tension between the value [***26] of governmental transparency and that of personal privacy. As we stated at the outset, the ultimate decision on this [**506] important issue must be made by the Legislature and we invite it to consider the question. However, on the basis of the statute adopted in 1977, the technology that existed at that time, and the caselaw available to us, we conclude that the trial court erred in

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[9] We define "internal union communications" [***25] to mean those communications sent only between or among HEA members and leadership, involving union, business or activities, including contract negotiation, grievance handling, and voting. Any e-mail involving these topics that is sent to the district is no longer purely between or among HEA members and leadership and, therefore, does not fall under this category.

its conclusion that all e-mails captured in a government e-mail computer storage system, regardless of their purpose, are rendered public records subject to FOIA. [10]

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, a public question being involved.

/s/ Mark J. Cavanagh

/s/ E. Thomas Fitzgerald

/s/ Douglas B. Shapiro

End of Document

[10] Although the question is not before us, we note that an e-mail transmitted in performance of an official function would appear to be a public record under FOIA.

EXHIBIT L
TO KUSSMANN DEC.

Gallant v. NLRB

United States Court of Appeals for the District of Columbia Circuit

February 18, 1994, Argued ; June 17, 1994, Decided

No. 92-5440

Reporter
26 F.3d 168 *; 1994 U.S. App. LEXIS 14875 **; 307 U.S. App. D.C. 27; 146 L.R.R.M. 2633

KARL GALLANT, APPELLANT v. NATIONAL LABOR RELATIONS BOARD, APPELLEE

Prior History: [**1] Appeal from the United States District Court for the District of Columbia. 92cv00873.

Core Terms

agency record, correspondence, renomination, documents, Exemption, district court, fax, recipients, summary judgment, letters, disclosure, materials, privacy, records

Case Summary

Procedural Posture
Appellant requester sought review of the order from the United States District Court for the District of Columbia, which denied the requester's action for the production of documents under the Freedom of Information Act and granted a summary judgment in favor of appellee National Labor Relation Board (board).

Overview
The requester filed an action under the Freedom of Information Act (FOIA) to obtain from the board documentary records of the efforts of a board member to secure her own reappointment. The district court denied the requester's action for the production of documents and granted a summary judgment in favor of the board. On appeal, the requester contended that the district court erred in ruling that the documents were not agency records. The court affirmed the order granting a summary judgment in favor of the board and held that the documents requested were not "agency records" and were exempt from disclosure under the FOIA. The board member's documents and correspondence relating to her renomination were personal records, and not agency records within the meaning of the FOIA.

Outcome
The court affirmed the order which granted a summary judgment in favor of the board in the requester's action under the Freedom of Information Act.

LexisNexis® Headnotes

Administrative Law > ... > Enforcement > Judicial Review > Standards of Review

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] The appellate court reviews orders granting summary judgment de novo.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] Summary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > ... > Freedom of Information > Enforcement > General Overview

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN3[] Under *5 U.S.C.S. § 552(a)(4)(B)*, a disclosure action under the Freedom of Information Act will lie only on a showing that an agency has (1) improperly; (2) withheld; (3) agency records.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > Governmental Information > Recordkeeping & Reporting

Governments > Legislation > Overbreadth

HN4[] The term "agency records" is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency. Nor does the statute sweep into the Freedom of Information Act's reach personal papers that may relate to an employee's work but which the individual does not rely upon to perform his or her duties.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN5[] An agency employee's creation of a document can be attributed to an agency depending on the purpose for which the document was created, the actual use of the document, and the extent to which the creator of the document and other employees acting within the scope of their employment relied upon the document to carry out the business of the agency.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN6[] The mere fact that the document in question relates to the business of the agency does not by itself render it an agency record.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN7[] A court's primary focus must be on the substance, rather than the form, of the information supplied by the government to justify withholding requested information. Accordingly, the materials provided by the agency may take any form so long as they give the reviewing court a reasonable basis to evaluate the claim of privilege.

Counsel: Hugh L. Reilly argued the cause and filed the briefs for appellant.

Martin Mayer Eskenazi, Attorney, National Labor Relations Board, argued the cause for appellee. With him on the brief were Linda Sher, Acting Associate General Counsel, National Labor Relations Board, Margery E. Lieber, Assistant General Counsel for Special Litigation, National Labor Relations Board, and Eric G. Moskowitz, Deputy Assistant General Counsel for Litigation, National Labor Relations Board.

Judges: Before MIKVA, Chief Judge, and WILLIAMS and SENTELLE, Circuit Judges. Opinion for the Court filed by Circuit Judge SENTELLE.

Opinion by: SENTELLE

Opinion

[*170] SENTELLE, *Circuit Judge:* Karl Gallant, a disappointed FOIA requester, appeals from an order granting summary judgment in his action to obtain from the NLRB documentary records of the efforts of a Board member to secure her own reappointment. He contends on appeal that the District Court erred in ruling that the documents were not agency records, and that certain information was protected by privacy exemptions under the FOIA. Because we perceive no error in either ruling, we affirm.

[**2] I. BACKGROUND

In 1991, as her term as a Member of the National Labor Relations Board ("NLRB" or "Board") was about to

expire, Mary Miller Cracraft sent letters and faxes to a number of individuals in an attempt to secure her reappointment. Cracraft continued this correspondence until August, when she failed to be renominated to the Board. In November, Gallant, Vice-President of the National Right to Work Committee, filed a request with the NLRB under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1988), seeking all documents "pertaining to efforts to secure or support the renomination of Mary Cracraft to the Board" or "reflecting the use of Board facilities, equipment or vehicles in efforts to secure or support the renomination of Mary Cracraft."

The NLRB initially rejected Gallant's request, stating that the documents in question were either Cracraft's "personal records" (rather than "agency records" for purposes of the FOIA) or were exempted from disclosure on privacy grounds under FOIA Exemption 6, 5 U.S.C. § 552(b)(6). When Gallant appealed, the Board released two letters written by NLRB Chairman James [**3] Stephens to individuals in the Office of the President, urging Cracraft's renomination to prevent any slowdown in the NLRB's case processing. The Board also released a copy of the NLRB's fax log, which recorded a total of 33 faxes sent by Cracraft relating to her renomination efforts. The names of the fax recipients were redacted from the logs on privacy grounds under FOIA Exemption 6.

On April 10, 1992, Gallant filed a FOIA action in the United States District Court for the District of Columbia. On June 19, Gallant moved for production of a Vaughn Index. [1] On July 1, the district court denied the motion. The government then moved for summary judgment on July 10, 1992. After considering the parties' pleadings and affidavits from NLRB Chairman Stephens, Cracraft, Diane Byrd (Stephens's confidential assistant), and Mildred Corthon (Cracraft's confidential secretary), the district court ruled in favor of the Board.

[**4] The court first ruled that Cracraft's correspondence relating to her renomination constituted personal rather than "agency records" [*171] under the test set out in Tax Analysts v. United States Dep't of Justice, 269 U.S. App. D.C. 315, 845 F.2d 1060, 1069 (D.C. Cir. 1988), aff'd, 492 U.S. 136, 106 L. Ed. 2d 112, 109 S. Ct. 2841 (1989). The court then concluded that the names of the fax recipients were properly redacted from the fax logs under FOIA Exemption 6, since release of the names implicated significant privacy interests and Gallant had failed to allege a public interest which outweighed those interests. Gallant challenges both of these rulings on appeal, arguing that the district court erred in granting summary judgment for the NLRB and in denying his motion for production of a Vaughn Index.

II. ANALYSIS

A

HN1[↑] We review orders granting summary judgment *de novo*. In the FOIA context this requires that we ascertain whether the agency has sustained its burden of demonstrating that the documents requested are not "agency records" or are exempt from disclosure under the FOIA. *See* [**5] § 552(a)(4)(B); United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 n.3, 106 L. Ed. 2d 112, 109 S. Ct. 2841 (1989). "HN2[↑] Summary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." Halperin v. CIA, 203 U.S. App. D.C. 110, 629 F.2d 144, 148 (D.C. Cir. 1980); *see also* McGehee v. CIA, 225 U.S. App. D.C. 205, 697 F.2d 1095, 1102 (D.C. Cir. 1983).

As we noted above, the government submitted affidavits from NLRB Chairman Stephens, Cracraft, Diane Byrd, and Mildred Corthon in support of its motion for summary judgment. The affidavits stated that Cracraft composed the renomination correspondence herself, although she showed the documents to several colleagues at the NLRB for suggestions and review. Once she or her staff had completed typing or writing the correspondence, it was generally sent out via first class mail: [**6] some on personal stationery, some on NLRB letterhead, some at Cracraft's personal expense, some as NLRB franked mail. The remaining letters were transmitted to their recipients via an NLRB fax machine.

Cracraft kept copies of much, but not all, of her correspondence relating to her renomination efforts. She stored the letters and return correspondence in the cubbyhole of a credenza behind her desk in her office, and these documents were not intermingled with agency materials involving Board business. Cracraft did not

[1] The name derives from Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 39 L. Ed. 2d 873, 94 S. Ct. 1564 (1974). A Vaughn Index is typically a detailed affidavit which summarizes the documents withheld by an agency and sets forth why such documents are exempted from disclosure.

allow other agency personnel to examine the files without her permission, although she occasionally asked her confidential assistant or chief counsel to retrieve certain materials for her, and once had her secretary arrange the correspondence for her chronologically. She took the files relating to her renomination efforts home with her when she cleared out her office following her departure.

Appellant does not dispute the content or adequacy of the government's affidavits; instead, he argues that a different legal conclusion should be drawn from the facts developed therein. In particular, he urges us to hold that the use of NLRB equipment and involvement of NLRB personnel [**7] in Cracraft's renomination campaign renders all of the Cracraft correspondence "agency records" within the meaning of the FOIA. We do not find those facts controlling.

HN3[↑] Under *5 U.S.C. § 552(a)(4)(B)*, a disclosure action under FOIA will lie only on a showing that an agency has "(1) "improperly;' (2) "withheld;' (3) "agency records.' " *Kissinger v. Reporters Committee, 445 U.S. 136, 150, 63 L. Ed. 2d 267, 100 S. Ct. 960 (1980)*. While the statute itself does not indicate the types of documents that constitute "agency records" within the meaning of the Act, *see Paisley v. CIA, 229 U.S. App. D.C. 372, 712 F.2d 686, 692 (D.C. Cir. 1984)*, case law makes clear that "*HN4*[↑] the term "agency records' is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency." *Tax Analysts, 492 U.S. at 145*. Nor does the statute "sweep into FOIA's reach personal papers that may "relate to' an employee's work ... but which the individual [**8] does not rely upon to perform his or her duties...." *Bureau of Nat'l Affairs [*172] v. United States Dep't of Justice, 742 F.2d 1484, 1493, 239 U.S. App. D.C. 331 (D.C. Cir. 1984)*.

This case requires us to determine whether Cracraft's "creation of a record [can] be attributed to the agency, thereby making the material an "agency record' disclosable under FOIA, rather than personal material not covered by the Act." *Id. at 1489*. In other contexts, "where a document is created by one agency and transferred to a second agency, control or possession [by the withholding agency] is the critical [factor in the "agency record'] analysis." *Id. at 1490; see also Tax Analysts v. United States Dep't of Justice, 269 U.S. App. D.C. 315, 845 F.2d 1060, 1069 (D.C. Cir. 1988), aff'd, 492 U.S. 136, 106 L. Ed. 2d 112, 109 S. Ct. 2841 (1989)* (relevant factors in assessing whether district court decisions were documents obtained by Tax Division of Department of Justice were intent of document's creator to retain or relinquish control over records; ability [**9] of agency to use and dispose of record; extent to which agency personnel have read or relied upon document; and degree to which document was integrated into agency's files).

However, "in cases ... where documents are created by an agency employee and located within the agency, *use of the document becomes more important in determining the status of the document under FOIA." Bureau of Nat'l Affairs, 742 F.2d at 1490* (emphasis added). In such cases *HN5*[↑] an agency employee's creation of a document can be attributed to an agency depending on "the purpose for which the document was created, the actual use of the document, and the extent to which the creator of the document and other employees acting within the scope of their employment relied upon the document to carry out the business of the agency." *Id. at 1493*. Thus, appellant's suggested test that employing agency resources, standing alone, is sufficient to render a document an "agency record," is inconsistent with governing precedent.

On the facts before the district court at summary judgment, we reach the same conclusion that court did. The Cracraft letters were "personal records" of Mary [**10] Cracraft, and not "agency records" within the meaning of the FOIA. Nothing in the record here indicates that Cracraft created the correspondence with anything other than the purely personal objective of retaining her job. The actual use of the correspondence, and Cracraft and other employees' lack of reliance on the correspondence to carry out the business of the agency, also supports the district court's finding that the documents were not agency records. Accordingly, even though employing agency resources in the creation of the correspondence is a relevant factor in the agency record analysis, the utilization of agency resources in this case is not as significant as the other factors employed in our precedents, which compel a conclusion that the Cracraft correspondence was personal, rather than attributable to the agency. [2]

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[2] While the NLRB may have benefitted from Cracraft's renomination, as suggested by Chairman Stephen's letters, *HN6*[↑] the mere fact that the document in question "relates to" the business of the agency does not by itself render it an agency record. *See Wolfe v. Dep't of Health & Human Serv., 229 U.S. App. D.C. 149, 711 F.2d 1077, 1081 (D.C. Cir. 1983)*.

[**11] B

Appellant also requests this court to order the production of a Vaughn Index, both to aid the court in determining whether the Cracraft correspondence qualifies as agency records, and as "a realistic compromise" method to obtain information regarding the recipients of the Cracraft correspondence, [3] whose privacy interest in the non-disclosure of their names he concedes for the purpose of this appeal. *See* Appellant's Reply Brief at 15-17. This we decline to do. Since "[*HN7*[↑] a] court's primary focus must be on the substance, rather than the form, of the information supplied by the government to justify withholding requested information .... whether that evidence comes in the form of an *in camera* review of the actual documents, something labelled a "Vaughn Index,' a detailed affidavit, or oral testimony [*173] cannot be decisive." *Vaughn v. United States, 936 F.2d 862, 867 (6th Cir. 1991)*. Accordingly, "the materials provided by the agency may take any form so long as they give the reviewing court a reasonable basis to evaluate the claim of privilege." *Delaney, Migdail & Young, Chartered v. IRS, 264 U.S. App. D.C. 52, 826 F.2d 124, 128 (D.C. Cir. 1987)*. [**12]

The affidavits supplied by the government were sufficiently detailed to allow the district court fairly to evaluate whether the Cracraft correspondence constituted agency records within the meaning of the FOIA. The affidavits were also sufficient to allow the district court to assess whether the names of the fax recipients were exempt from disclosure under FOIA Exemption 6.

As the Sixth Circuit noted in a similar setting, "the government need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document," so long as its definitions of relevant categories are "sufficiently distinct to allow a court to determine ? whether the specific claimed exemptions are properly applied." *Vaughn v. United States, 936 F.2d at 868* (internal quotation omitted). We consider [**13] the government under no obligation here to justify the withholding of the names of the fax recipients on an individual-by-individual basis under FOIA Exemption 6, as appellant seems to suggest, and that is the only ground upon which we could justifiably require the production of such a summary.

III. CONCLUSION

Because we agree that Cracraft's correspondence relating to her renomination constituted personal rather than "agency records" and that production of a Vaughn Index was not necessary given the adequacy of the government's affidavits, the orders of the district court are hereby affirmed.

It is so ordered.

End of Document

[3] In particular, Gallant seeks us to require the agency to indicate by class the "nature" of the fax recipient: "friend," "staff employee of Congress," "labor union executive," etc.

EXHIBIT M
TO KUSSMANN DEC.

Jacob Metzger

From: Rob Kosin <rkosin@uw.edu>
Sent: Wednesday, July 06, 2016 5:18 PM
To: Stephanie Olson; Jacob Metzger ; kkussmann@qwestoffice.net
Cc: Nancy Garland
Subject: FW: Public Records Request PR-2015-00810 Nelsen
Attachments: Public Records 7 6 16.pdf; PR-2015-00810 Stage 1 Release Ltr.pdf; June 10, 2016 Court Order.pdf

Stephanie, Jacob and Kristen:

I'm forwarding the release by the UW Office of Public Records today as a courtesy copy for you all.

Best regards,
Rob

Robert W. Kosin
Assistant Attorney General
University of Washington Division
4333 Brooklyn Avenue
University of Washington, Box 359475
Seattle, WA 98195-9475
Dir: 206.543.9226
Main: 206.543.4150
rkosin@uw.edu

From: pubrec [mailto:pubrec@uw.edu]
Sent: Wednesday, July 06, 2016 5:08 PM
To: 'mnelsen@myfreedomfoundation.com' <mnelsen@myfreedomfoundation.com>
Subject: Public Records Request PR-2015-00810 Nelsen

Please see attached.

Regards,

PERRY M. TAPPER
Compliance Officer
Office of Public Records and Open Public Meetings

Roosevelt Commons Box 354997
4311 11th Ave NE, #360, Seattle, WA 98195
206.543.9180 / fax 206.616.6294
pubrec@uw.edu / http://depts.washington.edu/pubrec/

UNIVERSITY of WASHINGTON

APPENDIX E

Assigned Judge: The Honorable Jeffrey Ramsdell
Trial Date: 4/24/17

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, a labor union Plaintiff/Petitioner v. THE UNIVERSITY OF WASHINGTON, an agency of the State of Washington, and FREEDOM FOUNDATION, an organization Defendant/Respondent	CAUSE NO. 16-2-09719-7 SEA JOINT CONFIRMATION REGARDING TRIAL READINESS [CLERK'S ACTION REQUIRED] **DUE DATE: April 3, 2017**

SEIU 925 and University of Washington jointly represent that they have conferred regarding the following information, are aware of all deadlines and requirements in the Pretrial Order, and certify the following to the Court regarding trial readiness. SEIU 925 and University of Washington believe that to the extent the Court's Order granting SEIU 925's Motion for Summary Judgment and for Permanent Injunction did not resolve the issue regarding the alleged unfair labor practice, filing of this Joint Confirmation is required by the Court's Pretrial Order (Dkt. 88, dated March 13, 2017), as well as the Case Schedule (Dkt. 2), and KCLCR 16(a)(1).

If parties are unable to confirm jointly each party is required to file a separate confirmation.

A. All parties [X] are [ ] are not represented by counsel. If any party is not represented by counsel, state that party's name, current mailing address, and telephone number.

B. This trial is a jury/ [X] non-jury trial.

C. It is estimated, based upon a maximum of **5** trial hours per day that this trial will last ___two___ days.

D. Alternative Dispute Resolution (ADR) with a neutral third party **WAS** accomplished:

☐ Yes [X] No

If ADR with a neutral third party **WAS NOT** accomplished, you must provide a detailed explanation and identify what arrangements have been made to complete ADR before trial. Counsel/party(ies) may be sanctioned for failure to comply with this requirement.

SEIU 925 filed a motion for (partial) summary judgment with hearing on March 24, 2017. ADR while that motion was pending did not seem an efficient use of resources. SEIU 925 also filed an unopposed motion without oral argument, also noted for March 24, 2017, to extend the deadline for ADR to March 31, 2017. On March 27, 2017, the court granted SEIU 925's motion for summary judgment.

There is a low likelihood of settlement because the records held by the University are now subject to a permanent injunction barring their disclosure. Freedom Foundation has appealed that order. A trial on the merits of SEIU 925's ULP charge is potentially moot if SEIU 925 prevails on appeal. The SEIU 925 is seeking to delay the trial and stay the remainder of the case pending the outcome of the appeal (*see* separate motion filed by SEIU 925 on or about April 3, 2017).

E. Interpreter(s): [X] No ☐ Yes Language: _____

Interpreter(s) requested for: (party/witness): _____

Interpreter(s) arranged by: _____

Expert(s): ☐ Yes [X] No Expert(s) Out of town: ☐ Yes ☐ No

Out of town parties: [X] Yes ☐ No

Freedom Foundation

Out of town witnesses ☐ Yes [X] No

F. OTHER:

OTHER REQUIREMENTS:

1. CR 16 CONFERENCE:

Any party may file a motion for a CR 16 Conference with the assigned Judge.

2. TRIAL WEEK AVAILABILITY :

If counsel has another trial scheduled at the same time, identify name, cause number, venue of case, and dates of trial. Unusual problems scheduling witnesses should be noted.

NOTICE: Cases otherwise ready may be held on standby status during the week trial is scheduled to start. Counsel must be within two hours of the designated courthouse while on standby.

Counsel for SEIU 925 do not have any other trials scheduled during the week of trial.
Counsel for UW do not have any other trials scheduled during the week of trial.

NOTE: It is the responsibility of the parties to arrange for necessary trial equipment.

/s/ Jacob Metzger 4/3/17
Jacob Metzger, WSBA # 39211 DATE
Kristen Kussman, WSBA #30638
1904 Third Ave, Suite 1030
Seattle, WA 98101
Attorneys for Plaintiff/Petitioner SEIU 925

/s/ Nancy S. Garland 4/3/17
Robert W. Kosin, WSBA #28623 DATE
Nancy S. Garland, WSBA #43501
Assistant Attorneys General
Office of the Attorney General – University of Washington Division
4333 Brooklyn Ave NE, 18th Floor
Seattle, WA 98195
Attorneys for Defendant University of Washington

Stephanie Olson, WSBA #50100 DATE
c/o Freedom Foundation
P.O. Box 552
Olympia, WA 98507
Attorney for Defendant Freedom Foundation

ORIGINAL: CLERK'S OFFICE
BENCH COPY: ASSIGNED JUDGE

REVISED : 9/27/2010

DOUGLAS DRACHLER MCKEE & GILBROUGH LLP

July 26, 2017 - 3:26 PM

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Appellate Court Case Title:	Freedom Foundation, Appellant v. Service Employees International Union Local 925, Respondents
Superior Court Case Number:	16-2-09719-7

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